Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

RAYMOND MOORE, Et Al.,

Petitioners,

v.

OWENS-CORNING, Et Al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

STEVE BAUGHMAN
Counsel of Record
ALICIA D. BUTLER
BARON & BUDD, P.C.
3102 Oak Lawn Ave.
Suite 1100
Dallas, Texas 75219
(214) 521-3605

Counsel for Petitioners

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Despite the prohibition of the Privileges and Immunities Clause of Article IV, may the State of Texas enact a statute that:

   a) provides for dismissal of certain tort claims that arise out of state because the claims belong to non-residents rather than Texas residents, when no substantial reason exists for discriminating against non-residents and less restrictive means exist to address the state's policy concerns?

   b) declines to provide Alabama residents the same protections that Texans receive under the Texas Constitution's open courts guarantee?

   c) contains a "borrowing" provision that, as applied to Alabama asbestos victims, fails to provide them any reasonable opportunity to pursue their claims?

2. Does the Equal Protection Clause of the Fourteenth Amendment allow for Texas to adopt a new statute that requires mandatory, retroactive dismissal of certain pending lawsuits, when otherwise identical cases filed *after* adoption of the statute are treated much less harshly and no rational basis exists for the distinction?

PARTIES TO THE PROCEEDING

The petitioners in this case are plaintiffs Raymond Moore, Melvin Horton, and George R. Aday. The respondents, who are defendants below, are Owens Corning Corporation, Pittsburgh Corning Corporation, Minnesota Mining & Manufacturing Co., A.P. Green Industries, Inc., Armstrong World Industries, Certainteed Corp., Dana Corp., and Quigley Co., Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 14

I. The Judgment Below Rests on an Antiquated Version of Privileges and Immunities Doctrine That, Despite Repeated Disavowals by this Court, Continues To Be Applied By State Courts in the Context of Forum Non Conveniens 14

A. This Court Should Clarify That States May Not Discriminate Without Justification Against Nonresidents in Granting Access To Their Courts 14

B. SB 220 Does Not Satisfy the Modern Privileges and Immunities Standard 18

II. Application of the Texas Borrowing Statute To Alabama Asbestos Claimants Violates the Article IV Privileges and Immunities Clause because the Alabama Claimants Have Had No Reasonable Opportunity To Pursue Their Claims, A Right Guaranteed To Texas Residents 22

TABLE OF CONTENTS – Continued

Page

III. This Court Should Clarify That Arbitrary Timing Classifications Cannot Survive Scrutiny Under the Fourteenth Amendment's Equal Protection Clause 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Academy of Trial Lawyers v. Seward, ___N.E.2d___, (No. 97-2419)(Ohio Aug. 16, 1999) 28

Asahi Metal Indus. v. Superior Court of California, 480 U.S. 102 (1987) 27

Austin v. New Hampshire, 420 U.S. 656 (1975) 26

Barnard v. Thorstenn, 489 U.S. 546 (1989)..... 19, 21, 23, 25

Binney v. Long, 299 U.S. 280 (1936)..... 30

Brown v. Seaboard Coast Line R.R., 192 S.E.2d 382 (Ga. 1972)..... 17

CSR, Ltd. v. Link, 925 S.W.2d 591 (Tex. 1996) 27

Canadian Northern Railway v. Eggen, 252 U.S. 553 (1920)..... *passim*

Chambers v. Baltimore & O. R.R., 207 U.S. 142 (1907)..... 19

Childs v. Haussecker, 974 S.W.2d 31 (Tex. 1998) 3, 26

Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) 18

Craig v. Boren, 429 U.S. 190 (1976).....19, 25

Cummings v. Wingo, 10 S.E. 107 (S.C. 1889), *overruled on other grounds, Brown v. Easterling*, 38 S.E. 118 (S.C. 1901) 17

Douglas v. New York, N.H. & H.R. R., 279 U.S. 377 (1929).....4, 13, 16, 17, 23

Dow Chemical Co. v. Alfaro, 786 S.W.2d 674 (Tex. 1990)..... 3

Elliott v. Johnston, 292 S.W.2d 589 (Mo. 1956)..... 17

TABLE OF AUTHORITIES – Continued

Page

Engineering Contractors Ass'n of South Fla., Inc. v. Metropolitan Dade Cty., 122 F.3d 895 (11th Cir. 1997), *cert. denied, Garrett v. Raytheon*, 368 So.2d 516 (Ala. 1979) 2, 20

Gore v. United States Steel Corp., 104 A.2d 670 (N.J.), *cert. denied*, 348 U.S. 861 (1954) 17

Grovey v. Washington Nat'l Ins. Co., 119 S.W.2d 503 (Ark. 1938) 17

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 4

Hicklin v. Orbeck, 437 U.S. 518 (1978) 26

Johnson v. Chicago, Burlington & Quinney R.R., 66 N.W.2d 763 (Minn. 1954) 17

Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980) 28

LaTourette v. McMaster, 248 U.S. 465 (1919) 15, 16

Lakin v. Senco Prods., Inc., ___ P.2d ___, 1999 WL 498088 (Or. July 15, 1999) 28

Loftus v. Lee, 308 S.W.2d 654 (Mo. 1958) 17

Lunding v. New York Tax Appeals Tribunal, 522 U.S. 287, 118 S. Ct. 766 (1998) 26

Miller v. Stauffer Chem. Co., 581 P.2d 345 (Idaho 1978) 23

Missouri ex rel. So. Ry. v. Mayfield, 340 U.S. 1 (1950) 16

Mooney v. Denver & Rio Grande W. R.R., 221 P.2d 628 (Utah 1950) 17

Neagle v. Nelson, 685 S.W.2d 11 (Tex. 1985) 3, 24

TABLE OF AUTHORITIES – Continued

Page

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984)..... 24

Price v. Atchison, T. & S.F. R.R., 268 P.2d 457 (Cal.), *cert. denied*, 348 U.S. 839 (1954) 17

Reed v. Reed, 404 U.S. 71 (1971).....19, 25

S.V. v. R.V., 933 S.W.2d 1 (Tex. 1996) 24

Salla v. County of Monroe, 399 N.E.2d 909 (N.Y. 1979), *cert. denied*, 496 U.S. 909 (1980).....15, 17

St. Louis–San Francisco Ry. v. Superior Court, 276 P.2d 773 (Okla. 1954) 17

Sun Oil Co. v. Wortman, 486 U.S. 717 (1988) 26

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985)..... 18

Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988).....16, 18

Toomer v. Witsell, 334 U.S. 385 (1948)..... 13, 15, 16, 23

Tyson v. Johns-Manville Sales Corp., 399 So.2d 263 (Ala. 1981) 2

United Bldg. & Constr. Tr. Council v. Camden, 465 U.S. 208 (1984)..... 16

United States v. Baldwin, 436 U.S. 371 (1978).....23, 24

United States v. Virginia, 116 S. Ct. 2264 (1996) ...19, 25

Whitney v. Madden, 79 N.E.2d 593 (Ill.), *cert. denied*, 335 U.S. 828 (1948)..... 17

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 20

Zurick v. Inman, 426 S.W.2d 767 (Tenn. 1968)..... 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1257 1

28 U.S.C. § 2403(b) 1

COLO. REV. STAT. § 13-82-106 (1997) 27

EQUAL PROTECTION CLAUSE, U.S. CONST., AM. XIV ... *passim*

N.D. CENT. CODE § 28-01.2-04 (1999) 27

PRIVILEGES AND IMMUNITIES CLAUSE, U.S. CONST., art. IV ..... *passim*

TEX. CIV. PRAC. & REM. CODE § 71.031(a)(3) 8, 13

TEX. CIV. PRAC. & REM. CODE § 41.008 9

TEX. CIV. PRAC. & REM. CODE § 71.051 ..... *passim*

TEX. CIV. PRAC. & REM. CODE § 71.052 ..... *passim*

TEX. CONST., art. I § 16 .....1, 22

WASH. REV. Code § 4.18.040 (1988) 27

OTHER

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-34, at 531 (2d ed. 1988) 15

OPINION BELOW

The opinion of the Texas Supreme Court (Appendix A) is reported at 997 S.W.2d 560. The various orders of the trial court granting and denying injunctive and declaratory relief (Appendix B), are unreported.

JURISDICTION

The judgment of the Texas Supreme Court was entered on July 1, 1999. App. 48a. This Court has jurisdiction under 28 U.S.C. § 1257. Pursuant to Supreme Court Rule 29.4(c), Petitioners have served this petition on the Attorney General of the State of Texas, due to the possibility that 28 U.S.C. § 2403(b) may apply.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Privileges and Immunities Clause of Article IV of the U.S. Constitution, the Equal Protection Clause of the Fourteenth Amendment, the Texas statute here in question ("Senate Bill 220"), and Article I, Section 16 of the Texas Constitution are set forth in Appendix C.

STATEMENT OF THE CASE

More than 50 years after this Court abandoned the formalistic distinction between state citizenship and state residence for purposes of applying the Privileges and Immunities Clause of Article IV, state courts continue to rely upon that anachronistic irrelevancy when confronted with a constitutional challenge to a law that discriminatorily restricts court access for out-of-state residents. The time has finally come for this Court to bring the time-worn doctrine of forum non conveniens in line with the modern view of the Privileges and Immunities Clause, and this case presents an ideal vehicle for doing so. Here, the Texas Supreme Court upheld a Texas forum access statute because it discriminated only on the basis of state residence, not state citizenship. Additionally, the court upheld a borrowing statute that denies Alabama

latent injury victims a reasonable time to assert their claims in Texas courts, despite a Texas constitutional provision that guarantees such an opportunity to similarly-situated Texas citizens. In so holding, the Texas court ignored the trial court's findings that no substantial reason exists to justify the discrimination against out-of-state residents, and that less restrictive means were available to accomplish the policy goals of the legislation. This Court should grant certiorari to consider whether states may discriminate without justification against non-residents in providing access to their courts.

1. Historical Background

The story of this case begins with the Supreme Court of Alabama's decision in *Garrett v. Raytheon*, 368 So.2d 516 (Ala. 1979). *Garrett* held that, for purposes of Alabama's one-year limitations period, a cause of action for latent injuries manifested from a toxic exposure "accrues" at the time of the plaintiff's last exposure to the toxic substance, regardless of "the plaintiff's ignorance of the tort or injury." 368 So.2d at 521. Under *Garrett*, Alabama citizens could no longer assert their asbestos-related personal injury and death claims in Alabama courts, because asbestos-related diseases first manifest themselves many years after exposure.

The Alabama Legislature immediately tried to correct the pernicious result of *Garrett* by enacting a discovery rule in 1980. The Alabama Supreme Court held, however, that the new statute unconstitutionally deprived asbestos defendants of their vested rights under the Alabama constitution by reviving previously-barred claims. *Tyson v. Johns-Manville Sales Corp.*, 399 So.2d 263, 269 (Ala. 1981). Alabama's asbestos victims began to search for a forum which would assert jurisdiction over their claims and in which the applicable law allowed them time to file suit after they had a reasonable opportunity to discover the existence of their claims.

In Texas, as in most states, a cause of action for latent personal injuries caused by toxic exposures does not accrue for purposes of limitations until the plaintiff "knows or,

through the exercise of reasonable care and diligence, 'should have known of the wrongful act and resulting injury.' " *Childs v. Haussecker*, 974 S.W.2d 31, 37 (Tex. 1998) (citations omitted). The Texas discovery rule finds its ultimate source in the Texas Constitution, which protects citizens from legislative acts that abridge the right to sue before claimants have had a reasonable opportunity to discover the wrong and bring suit. *Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985). Indeed, the Texas Supreme Court has described the result reached without such a rule as " 'shocking' and . . . so absurd and so unjust that it ought not be possible." *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984).

Texas became a significant forum for the claims of Alabama asbestos victims as a result of the combined effect of two rules of law. First, until 1997, Texas was among the states that had no "borrowing" statute requiring an out-of-state plaintiff to satisfy the statute of limitations of the plaintiff's home state. Instead, Texas courts applied the traditional common law rule that the statute of limitations of the forum state controls. Additionally, Texas law did not permit trial courts to dismiss the claims of personal injury and wrongful death victims on the basis of "forum non conveniens."

While the Alabama asbestos cases being filed in Texas in the 1980s had very little political import, the presence of nonresident asbestos claims in Texas courts became a highly politicized issue in the next decade. In 1990, the Texas Supreme Court interpreted a 1913 statute to prohibit Texas courts from applying the common law doctrine of forum non conveniens to dismiss the personal injury and wrongful death lawsuits of foreign plaintiffs whose claims had arisen outside Texas. *See Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990). This much-ballyhooed and controversial decision generated a frenzy of legislative activity, spurred by the corporate "tort reform" forces armed with "Texas is for Texans" rhetoric. Such legislative efforts initially failed, but in 1993, the Texas Legislature created TEX. CIV. PRAC. & REM. CODE § 71.051, which gave Texas courts discretion to decline jurisdiction on forum non conveniens grounds when certain statutory requirements were satisfied.

In essence, the 1993 version of section 71.051 codified the factors traditionally considered under the common law doctrine of forum non conveniens, including the existence of an alternative forum that provides a remedy for the plaintiff's causes of action.[1] *Compare* former TEX. CIV. PRAC. & REM. CODE § 71.051 (1993) (setting forth statutory criteria for forum non conveniens dismissal) *with Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (describing factors to be considered under common law doctrine). But while the 1993 forum non conveniens statute applied to most personal injury and death cases brought by out-of-state residents, the statute did not apply to certain subcategories of cases—including lawsuits alleging asbestos-related harm. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(f)(5).

After the passage of the 1993 forum non conveniens statute with its "asbestos exception," out-of-state claimants continued to file more asbestos claims in Texas. The new influx of cases drew considerable attention from tort reform groups such as the Texas Civil Justice League and the asbestos manufacturing defendants themselves. By the time the Texas Legislature convened in January 1997, there were roughly 40,000 out-of-state asbestos claims pending in Texas state courts, and the issue of out-of-state asbestos filings had become a political lightning rod. The Texas Civil Justice League complained that more than 30,000 of those claimants were Alabama citizens who lacked any suitable alternative

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[1] There was one significant difference between the common law doctrine and the 1993 statute: like the 1997 version of section 71.051 described below, the 1993 version exempted Texas citizens from dismissal. *See* former TEX. CIV. PRAC. & REM. CODE § 71.051(f)(1) (preventing dismissal if any claimant properly joined in the action is a "legal resident" of Texas). Under the common law doctrine, citizens of the forum are also subject to dismissal, if the trial court concludes that the balance of convenience and public and private interests favors litigating the case elsewhere. *Cf. Douglas v. New York, N.H. & H.R. R.*, 279 U.S. 377 (1929) (noting that the Privileges and Immunities Clause of Article IV of the U.S. Constitution forbids states from excluding their own citizens from application of forum non conveniens).

forum. *See* App. 74a. Responsive to such complaints, the Legislature began to consider Senate Bill 220, a proposed statute clearly intended to prevent Alabama asbestos claimants from pursuing any remedy in Texas. *See, e.g.*, App. 76a (Statement from the House floor by the House sponsor of SB 220, Rep. Junell, explaining that the borrowing provision was aimed to stop Alabama citizens from pursuing a remedy in Texas, since their cases "were barred from being brought in Alabama"); *see also* App. 75 (similar statement by Rep. Junell describing "special procedures" for non-resident asbestos victims).

Although the 1997 Legislature was bombarded with statistics on the total number of non-resident asbestos claims pending in Texas courts, the evidence before the Legislature nonetheless indicated that such cases were neither preventing nor delaying trials for Texas residents, nor were they imposing additional costs on the Texas judicial system. During the Legislature's consideration of SB 220, it heard testimony from several state district court judges who preside over out-of-state asbestos cases. Of the three Texas trial judges who testified, only one, Bexar County District Judge David Peeples, favored passage of the bill. Judge Peeples's experience with out-of-state asbestos cases was limited to a single trial, though he said that "others [have] come to my court." App. 77a. By contrast, both of the other two testifying judges have handled thousands of such cases because they preside over centralized, county-wide asbestos dockets in the two largest counties in the state. The Hon. Anne Ashby, judge of the 134th District Court, is the managing "asbestos judge" in Dallas County, while the Hon. Scott Link is the "master asbestos judge" in Harris County. Both Link and Ashby emphasized that, when handled through a centralized asbestos docket, out-of-state asbestos cases created few burdens on the judges, no additional costs in court personnel, and no docket congestion resulting in delays for other cases. As Link put it:

> So far as clogging the dockets, absolutely not. It's not true in Harris County. And if it were so, I think there would be people here down to testify from

> Harris County about the difficulty and the problems it's created down there, but there [are] not . . .

App. 80a. Link added that no additional clerks or other personnel had been hired to help process the lawsuits, and that the cases posed no costs for the taxpayers: "I do have the numbers in Harris County on how much the out-of-state asbestos cases have cost citizens of Harris County. . . . Zero. The filing fees for the 7,441 cases in Harris County [are] $1.3 million to the State of Texas and to the citizens of Harris County." App. 78a; *see also* App. 81a (Fiscal Notes of Legislative Budget Board to SB 220, finding that "[n]o significant fiscal implication to the State is anticipated" by the passage of the bill). Ashby echoed Link, saying that the Dallas County system for handling asbestos cases is "manageable, it can be handled, and it works." App. 78a. Ashby said that she spent only about three hours a month handling common issues as the master judge, and that she had only tried two asbestos cases to verdict despite presiding over hundreds of such cases that had been assigned to her court during her seven and a half years on the bench. *Id.*

The most recent statistics compiled by the Texas Judicial Council corroborate the testimony of Link and Ashby. Those statistics, which were judicially noticed by the district court in this case, *see* App. 82a, reflect that in the fiscal year 1996, Texas district courts disposed of 470,210 cases, while only 559,646 cases were pending at the end of that year. During 1996, Texas civil district courts disposed of more than 100,000 cases that had been pending less than three months, and more than three-fourths of the 470,210 cases that were resolved in 1996 had been on the docket 18 months or less. *Id.* Thus, the available evidence indicates that Texas courts have not experienced delays resulting from out-of-state asbestos filings.

2. SB 220: The Statute at Issue.

In May 1997, the Legislature changed Texas law by enacting SB 220, in an effort to rid Texas courts of all present and future claims by out-of-state asbestos victims. The simple

goal of permitting application of forum non conveniens in asbestos cases on a prospective basis could have been accomplished easily and constitutionally, but SB 220 seeks to do much, much more. First, SB 220 prevents Texas courts from continuing to exercise jurisdiction over claims by out-of-state asbestos victims by mandating dismissal of certain claims that arise outside the state if the plaintiff is not a resident of Texas.

The bill's dismissal provisions are implemented through a bizarre classificatory scheme that not only discriminates on the basis of state residence, but also establishes several different sets of rules to be applied to different groups of similarly situated out-of-state asbestos cases. To address the "problem" of claims by Alabama asbestos victims, SB 220 adds a "borrowing" provision that requires application of the statute of limitations of the home state of a non-resident plaintiff, even if that limitations law imposes an impossible condition upon the claimant's remedy. And SB 220's effect is not merely prospective: it retroactively applies to all asbestos cases commenced in Texas courts on or after August 1, 1995.

The principal discrimination embedded within SB 220 is the exclusion of Texas residents from its scope. That is, a Texas resident's claim for injuries occurring outside this state cannot ultimately be dismissed under the provisions of SB 220, even if Texas would be an inconvenient forum in which to try the case. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(e) ("The court may not stay or dismiss a plaintiff's claim . . . if the plaintiff is a legal resident of Texas").[2] This exclusion for Texas citizens was a central provision of SB 220, and its sponsors employed the exemption as one of the bill's key

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[2] As defined in section 71.051(h), " '[l]egal resident' means an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision *despite temporary residence elsewhere or despite temporary absences*. . . . " (Emphasis added). Thus, any person who intends for Texas to be their permanent home is a "legal resident" of Texas for purposes of section 71.051, even if they currently reside elsewhere.

selling points. As Rep. Robert Junell told the members of the House during floor debates on the bill:

> It does provide—and I think this is important—for Texas residents. It provides an exception for claims by Texas residents. . . .
>
> * * *
>
> Section 2 of the bill [TEX. CIV. PRAC. & REM. CODE § 71.052] . . . involves special procedures for asbestos claims that have been filed by nonresidents. *And I want to say this again. These are claims that were filed by nonresidents of the state of Texas* that arose outside of the state of Texas.

App. 75a (emphasis added). The Senate sponsor of SB 220, Sen. Teel Bivins, took similar pains to explain to the full Senate that no Texas citizen would be affected by the bill. In response to a question regarding the applicability of SB 220's provisions to a Texas citizen who suffers harm out-of-state, Bivins said, "[T]here is one guarantee in this bill, Senator, and that is if you are a Texas resident, you may bring that claim in Texas." App. 87a.[3]

Beyond discriminating on the basis of state citizenship, SB 220 also provides for discriminatory treatment of otherwise identically-situated non-resident asbestos claimants based solely on when their cases were commenced. It actually provides for much *harsher* treatment of cases that were already pending at the time of the statute's enactment. SB 220 creates four categories of non-resident asbestos plaintiffs, each of which receives different treatment under the statute:

1) those who filed prior to August 1, 1995, to whom the statute does not apply;
2) those who filed after August 1, 1995, but before January 1, 1997, who can maintain their cases in Texas only if they agree to the application of Texas's substantive law restricting their

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[3] Texas residents are also exempted from application of the borrowing provision of SB 220. *See* TEX. CIV. PRAC. & REM. CODE § 71.031(a)(3).

claims for punitive damages (TEX. CIV. PRAC. & REM. CODE § 71.052(c));[4]

3) those who filed on or after January 1, 1997 but *before* the enactment of the statute (May 29, 1997), whose cases must be dismissed without consideration of any case-specific factors such as convenience, the public and private interests favoring retention of the case, or the availability of an alternative forum (TEX. CIV. PRAC. & REM. CODE § 71.052(b)); and

4) those who have filed or will file cases *after* enactment of the statute, whose cases are potentially subject to discretionary dismissal following a hearing in which the trial court considers the traditional, common law forum non conveniens factors under section 71.051.

Although SB 220 has loosely been described as a "forum non conveniens" bill, the only provision of the bill that actually implements anything resembling that common law doctrine is section 71.051, the general provision that prospectively applies to all personal injury and death claims (asbestos and non-asbestos alike) filed by citizens of other states on or after May 29, 1997.[5] Like the common law doctrine, section 71.051 requires trial courts to analyze each individual claim to determine whether it should remain in Texas, and it requires the court to balance several case-specific factors in exercising its discretion to make that call. Moreover, under section 71.051, courts may not dismiss a plaintiff's claim if

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[4] The August 1, 1995 date is noteworthy because the substantive restrictions on punitive damages that non-resident plaintiffs may elect to have applied under section 71.052(c) did not become part of Texas law until *September 1, 1995*. Any claim by a Texas citizen who filed a lawsuit in Texas between August 1, 1995 and August 31, 1995 was not subject to those restrictions on punitive damages, which are codified at TEX. CIV. PRAC. & REM. CODE § 41.008.

[5] Non-asbestos personal injury and wrongful death claims filed before the enactment of SB 220 are subject to the 1993 version of that provision.

the plaintiff makes a "prima facie showing that an act or omission that was a proximate or producing cause of the injury occurred in this state." TEX. CIV. PRAC. & REM. CODE § 71.051(f). This exemption is of considerable significance in the context of asbestos cases, since nearly all victims of asbestos disease, including the Petitioners in this case, allege that exposure to products manufactured in Texas contributed to their asbestos-related disease.

By sharp contrast to section 71.051, neither the mandatory dismissal provision of section 71.052(b) nor the "punitive damages election" provision of 71.052(c) involve discretionary, *ad hoc* decisionmaking by trial courts. Rather, those provisions *automatically* provide for dismissal of *all* asbestos claims filed by citizens of other states who were exposed to asbestos outside of Texas. Case-specific considerations of convenience, the public and private interests favoring retention of the case in this forum, and the existence of an alternative forum that will provide the plaintiff a remedy are not relevant under either subsection of 71.052.

In addition to regulating whether a Texas court will, as a threshold matter, retain jurisdiction over lawsuits by citizens of other states, SB 220 also contains a provision that deprives Alabama asbestos victims of any remedy even when their claims have sufficient connection with this state to be heard on the merits by a Texas court. Without regard for the Texas constitutional guarantee that mandates application of a discovery rule for victims of latent injuries, SB 220 adopts a "borrowing" statute that requires application of the limitations law of the home state of a non-resident plaintiff. This statutory choice-of-law rule poses few problems for those who hail from other states that also have discovery rules. But for citizens of Alabama who suffer latent injuries, the provision is disastrous: it requires Texas courts to apply Alabama's absolute statute of limitations, without the benefit of a discovery rule. Thus, as the Legislature intended, SB 220 completely prohibits the Alabama asbestos plaintiffs from pursuing their claims, even if their claims survive forum non conveniens dismissal under TEX. CIV. PRAC. & REM. CODE § 71.051.

3. The Proceedings Below.

Petitioners' constitutional challenges to SB 220 arise from various declaratory judgment claims appended to Petitioners' damages claims for asbestos-related personal injuries. Both Messrs. Moore and Horton are Alabama citizens who developed asbestos-related illness after they were already barred from filing suit under Alabama law. The parties stipulated at trial that applying the borrowing provision of SB 220 to their claims would cause Petitioners' claims to be time-barred by Alabama limitations law. App. 82a.

In their claims for declaratory and injunctive relief, Petitioners Moore and Horton asserted that several different provisions of SB 220 are constitutionally invalid on a number of independent grounds, including that:

1) facially and as applied to these Petitioners, sections 71.052(b) and 71.051 violate the Privileges and Immunities Clause of Article IV of the U.S. Constitution;

2) on its face, section 71.052(b) irrationally discriminates among otherwise identically-situated plaintiffs solely based on when they filed their claims, in violation of the equal protection clauses of the U.S. Constitution; and

3) as applied to Alabama asbestos victims, the "borrowing" provision of section 71.031(a)(3) violates the open courts guarantee found in Article I, Section 16 of the Texas Constitution, as well as the Privileges and Immunities Clause of Article IV of the U.S. Constitution.

On November 4, 1997, the Hon. John K. Dietz held a bench trial with respect to Mr. Moore's and Mr. Horton's claims for declaratory and injunctive relief in the *Deford* case, as well as Defendant Owens Corning's counterclaims for declaratory relief in the *Aday*, *Carroll*, *Carter*, and *Chandler*

cases.[6] Because the underlying personal injury claims at issue in all five cases were not yet ripe for trial and would require a jury, those individual damages claims were not included in the trial and are still pending.

The trial court heard evidence and legal argument regarding the history and constitutionality of SB 220, and it took judicial notice of the most recent statistics regarding case dispositions and the time required for such dispositions in Texas courts. Based on this evidence and the legislative history of SB 220, Judge Dietz made the emphatic factual finding that out-of-state asbestos claims were having no negative impact on the claims of Texas citizens: "I don't find any evidence before this Court, not a scintilla of evidence, that a Texas plaintiff, a Texas resident, a Texas citizen is being denied their day in court." App. 85a.

Although the trial court rejected Plaintiffs' equal protection challenge to the mandatory dismissal provision of 71.052(b), the court nonetheless concluded that because "less restrictive means to manage this litigation are available in current practice in many district courts throughout this state" both the mandatory dismissal provision and the exemplary damages election provision of SB 220 violate the Privileges and Immunities Clause of Article IV of the U.S. Constitution. App. 85a. With respect to the borrowing provision, the trial court concluded that it does not violate either the Privileges and Immunities Clause or the Texas open courts provision, because "[u]nder the common law a nonresident had no legal right to address the courts of this state for a cause of action accruing outside the state." App. 83a-84a.[7]

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[6] Owens Corning sought a declaration that section 71.052(c), the exemplary damages election provision of SB 220, violates no constitutional provisions.

[7] Immediately following trial, the district court announced its decision that the borrowing provision *does* violate the Privileges and Immunities Clause as applied to Alabama asbestos plaintiffs, but the court reconsidered that ruling before entering written orders on November 21, 1997. *See* App. 84a.

The trial court also found that application of the borrowing statute to Petitioner Melvin Horton violated the Texas Constitution's prohibition against "ex post facto" legislation, because the Legislature provided no "reasonable time" for Mr. Horton to file his existing cause of action when it enacted the new limitations provision. App. 85a. Finally, without explanation, the trial court rejected Plaintiffs' contention that the prospective forum restriction provision of section 71.051 violates the Privileges and Immunities Clause. App. 83a. Based on these findings, the trial court enjoined Respondents from invoking 71.052, and also declined Melvin Horton's request for injunctive relief with respect to 71.051. *See* App. 49a-53a.

On direct appeal from the trial court's injunctions, the Texas Supreme Court rejected *all* of Petitioners' constitutional challenges, reversing in part the judgment of the trial court. App. 3a. With respect to Petitioners' privileges and immunities challenges to the forum restriction provisions of sections 71.051 and 71.052, the Texas court explained that it felt constrained to uphold the statute under this Court's now-outdated decision in *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929), which held that a forum non conveniens statute did not violate the Privileges and Immunities Clause because it discriminated only on the basis of residence, rather than citizenship. "Plaintiffs are correct that modern privileges and immunities law differs from that announced in *Douglas*, *see Toomer v. Witsell*, 334 U.S. 385 (1948), and the distinction between residents and citizens is in disfavor in most contexts, [but] we are nonetheless bound to follow *Douglas* because it has never been overruled by the Supreme Court." App. 18a. The Texas court noted that other "courts continue to rely on *Douglas*, despite later developments in privileges and immunities jurisprudence." App. 19a.

The Texas court also found that there was a rational basis for the strange classification scheme established by sections 71.052 and 71.051, and that the borrowing provision of 71.031(a)(3), as applied to Alabama asbestos victims, violated neither the Texas Constitution's open courts guarantee nor the Privileges and Immunities Clause of Article IV. App.

26a, 45a-47a.[8] The court did not address Petitioners' argument that because the open courts provision of the Texas Constitution guarantees that Texas asbestos victims must have a reasonable opportunity to file suit after discovering their injuries, the Article IV Privileges and Immunities Clause requires that Texas provide that same state constitutional protection to Alabama asbestos victims.

REASONS FOR GRANTING THE WRIT

I. The Judgment Below Rests on an Antiquated Version of Privileges and Immunities Doctrine that, Despite Repeated Disavowals by this Court, Continues to be Applied by State Courts in the Context of Forum Non Conveniens.

A. This Court Should Clarify That States May Not Discriminate Without Justification Against Non-residents in Granting Access To Their Courts.

The Texas Supreme Court's decision in this case highlights the need for this Court to establish that states may not immunize discriminatory court access restrictions from scrutiny under the Article IV Privileges and Immunities Clause simply by labeling those restrictions as "forum non conveniens" provisions. For more than 50 years this Court has required that any discrimination against non-residents of a state must be substantially related to a substantial government interest in order to pass constitutional muster. Nonetheless, with this decision, Texas has joined the growing number of states which, in the context of constitutional review of so-called "forum non conveniens" enactments, have wholly disregarded modern privileges and immunities doctrine in favor of an outmoded analysis that this Court has repeatedly disavowed.

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[8] The court also determined, contrary to the trial court, that retroactive application of the borrowing statute did not violate the Texas Constitution. App. 23a.

Since the early development of constitutional interpretation of the Privileges and Immunities Clause in the 19th and early 20th centuries, this Court has radically shifted its analytical approach in applying the provision. Initially, this Court applied the clause to strike down *any* state legislation that discriminated against citizens of other states, so long as that legislation "touched fundamental rights of state citizenship." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-34, at 531 (2d ed. 1988). But, "sensitive to the special problems that non-residents presented for state policies, the Supreme Court, in the late nineteenth and early twentieth centuries, carved out exceptions for discriminations that 'could not reasonably be characterized as hostile to the rights of citizens of other states.' " *Id.* (quoting *Blake v. McClung*, 172 U.S. 239, 256 (1898)). Such exceptions were created by the Court on an *ad hoc* basis, "in the exercise of what has been characterized as a largely standardless judicial judgment." *Salla v. County of Monroe*, 399 N.E.2d 909, 913 (N.Y. 1979), *cert. denied*, 496 U.S. 909 (1980). In response to this "unstructured and unpredictable method for determining the availability of a constitutional principle on which the unity of the citizens of the Nation in large part rested," in the middle of the twentieth century, the Court "substituted a more sophisticated measure that balanced the national interest in access to local resources against the local interest for developing homegrown cures for indigenous evils." *Id.* (citing *Toomer v. Witsell*, 334 U.S. 385 (1948)).

Prior to the adoption of the modern approach to privileges and immunities in *Toomer*, one of the exceptions this Court had carved out as "non-hostile" to citizens of other states were state enactments that discriminated only on the basis of residence, without discriminating on the basis of state citizenship itself. *See, e.g., LaTourette v. McMaster*, 248 U.S. 465, 469-70 (1919) (upholding a South Carolina statute that excluded non-residents from being licensed as insurance brokers, on the basis that South Carolina citizens who resided outside the state were also excluded by the statute). Thus, so long as a restriction would be equally applied to both non-resident non-citizens *and* non-resident citizens (that is, people

who, though maintaining a permanent domicile in the state and thereby qualifying as a citizen, currently reside elsewhere), the restriction did not violate the Privileges and Immunities Clause of Article IV.

In *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929), this Court relied on the residence–citizenship distinction to uphold a New York forum non conveniens statute. That statute gave trial courts discretion to dismiss actions brought by residents of other states on grounds that New York provided an inconvenient forum, but it expressly precluded any such dismissal of actions brought by New York residents. 279 U.S. at 386. Citing *LaTourette*, the Court stated that "[a] distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence." Thus, because cases brought by non-resident citizens of New York were equally subject to dismissal as cases brought by non-citizens, the discriminatory effect of the statute did not transgress the Privileges and Immunities Clause of Article IV. *Id.*; *see also Missouri ex rel. So. Ry. v. Mayfield*, 340 U.S. 1, 3-4 (1950) (stating in dicta that "if a state chooses to '(prefer) residents in access to often overcrowded Courts' and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control.") (quoting *Douglas*).

This Court long ago abandoned the formalistic distinction between residence and citizenship that was the linchpin of the *Douglas* decision. In *Toomer* itself, which established the modern approach to privileges and immunities, the court noted that any argument based on that dichotomy "would be without force in this case[,]" despite the fact that the statute at issue there was "couched in terms of residence." 334 U.S. at 397. More recent cases have consistently reaffirmed that laws that discriminate solely on the basis of state residence will not escape scrutiny under the Privileges and Immunities Clause. *See, e.g., Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988) ("While the Privileges and Immunities Clause cites the term 'Citizens,' for analytic purposes citizenship and residency are essentially interchangeable"); *United Bldg. &*

Constr. Tr. Council v. Camden, 465 U.S. 208, 216 (1984) (same).

Here, the Texas Supreme Court relied on the residence–citizenship distinction drawn in *Douglas* even though it expressly acknowledged that "modern privileges and immunities law differs from that announced in *Douglas*, *see Toomer v. Witsell*, 334 U.S. 385 (1948), and the distinction between residents and citizens is in disfavor in most contexts." App. 18a. The Texas court pointed out that it was not alone in this regard, as at least ten other states have also relied upon *Douglas* to uphold their own forum restrictions. *See* App. 13a (citing *Grovey v. Washington Nat'l Ins.* Co., 119 S.W.2d 503 (Ark. 1938); *Price v. Atchison, T. & S.F. R.R.*, 268 P.2d 457 (Cal.), *cert. denied*, 348 U.S. 839 (1954); *Whitney v. Madden*, 79 N.E.2d 593 (Ill.), *cert. denied*, 335 U.S. 828 (1948); *Johnson v. Chicago, Burlington & Quinney R.R.*, 66 N.W.2d 763 (Minn. 1954); *Loftus v. Lee*, 308 S.W.2d 654, 657 (Mo. 1958); *Elliott v. Johnston*, 292 S.W.2d 589, 595 (Mo. 1956); *Gore v. United States Steel Corp.*, 104 A.2d 670 (N.J.), *cert. denied*, 348 U.S. 861 (1954); *St. Louis–San Francisco Ry. v. Superior Court*, 276 P.2d 773 (Okla. 1954); *Zurick v. Inman*, 426 S.W.2d 767, 770 (Tenn. 1968); *Mooney v. Denver & Rio Grande W. R.R.*, 221 P.2d 628 (Utah 1950)); *see also Brown v. Seaboard Coast Line R.R.*, 192 S.E.2d 382, 383 (Ga. 1972); *Cummings v. Wingo*, 10 S.E. 107, 110 (S.C. 1889) (decided prior to *Douglas*, but also upholding forum restriction law on the basis that "[t]he provisions relate only to residence, and not to citizenship"), *overruled on other grounds*, *Brown v. Easterling*, 38 S.E. 118 (S.C. 1901).

This Court should grant certiorari to eliminate the substantial confusion among state courts regarding the appropriate constitutional test to be applied in the context of a privileges and immunities challenge to a restrictive forum statute.

B. SB 220 Does Not Satisfy the Modern Privileges and Immunities Standard.

The restrictive forum provisions of SB 220 violate the Article IV Privileges and Immunities Clause both because they discriminate against residents of other states without substantial reason and because less restrictive means are available to accomplish the goals of the statute. That clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." It "was designed 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.' " *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988) (quoting *Paul v. Virginia*, 8 Wall. 168, 180, 19 L.Ed. 357 (1869)).

Courts have long recognized that gaining access to the courts of a state is a fundamental right deserving of protection under the Privileges and Immunities Clause. *See Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230) (listing the right "to institute and maintain actions of any kind in the courts of the state" as a fundamental privilege of state citizenship).[9] As the Court put it in 1907:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. *It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens.* Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

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[9] Although the "natural rights" theory underlying the *Corfield* decision has long been discarded, the rights listed by Justice Washington are still protected by the Privileges and Immunities Clause today. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 281 n.10 (1985).

Chambers v. Baltimore & O. R.R., 207 U.S. 142, 148 (1907) (emphasis added).

To the extent legislation affecting access to the courts discriminates on the basis of state residence, courts must analyze such legislation pursuant to "intermediate" constitutional scrutiny. That is, the discriminatory legislation is presumed invalid "unless (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against non-residents bears a substantial relationship to the State's objective." *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989); *cf. Craig v. Boren*, 429 U.S. 190, 198 (1976) (describing intermediate scrutiny in the context of an equal protection challenge to an Oklahoma law that discriminated on the basis of gender: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). Under intermediate scrutiny, "the burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996). "In deciding whether the discrimination bears a substantial relation to the State's objectives, we consider, among other things, whether less restrictive means of regulation are available." *Barnard*, 489 U.S. at 552.

Neither the Legislature nor Respondents articulated any substantial governmental objectives furthered by the discrimination against residents of sister states contained within the various provisions of SB 220. "Administrative ease and convenience" are not sufficiently important state objectives to justify discrimination under intermediate scrutiny. *Craig*, 429 U.S. at 198. Thus, "reducing the workload on probate courts" has been held insufficient reason to justify gender discrimination. *Reed v. Reed*, 404 U.S. 71, 76 (1971). And, more recently, this Court noted that "a State . . . may not solve the problem of congested court dockets by discriminating against nonresidents." *Barnard*, 489 U.S. at 555.

When reviewing a statute under either a strict or intermediate level of constitutional scrutiny, such as that required here under the Privileges and Immunities Clause, or in the case of an equal protection challenge to a statute that discriminates on the basis of race or gender, the trial court must

initially make a *factual* determination whether the discrimination is justified by a substantial or compelling governmental objective. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (when reviewing an affirmative action program, "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that the remedial action was necessary."); *Engineering Contractors Ass'n of South Fla., Inc. v Metropolitan Dade Cty.*, 122 F.3d 895, 905 (11th Cir. 1997) ("For gender-conscious programs, we decide if the district court clearly erred in determining whether the district court had a sufficient probative basis in evidence to justify affirmative action"), *cert. denied*, 118 S. Ct. 1186 (1998).

The trial court here made an express finding of fact that there was no evidence to support the Legislature's apparent concern that out-of-state asbestos cases were affecting the ability of Texas residents to access the courts.[10] This finding is certainly supported by factually sufficient evidence, and the Texas Supreme Court made no effort to contest it. *See* App. 43a-44a (noting only that the finding was irrelevant under the legal standard being applied). As previously discussed, *see supra* at 6, the statistics from the Office of Court Administration demonstrate that Texas courts are handling their civil dockets quite rapidly and efficiently, despite the presence of the asbestos cases. Furthermore, the weight of the testimony before the Texas Legislature by trial court judges who handle such asbestos cases established that those claims pose no significant burden on the courts. That testimony also confirmed that centralized docket procedures efficiently streamline management of the asbestos cases, which share many common issues. *See supra* at 5-6. Finally, both the "master asbestos judge" for Houston and the Legislative Budget Board determined that the cases encompassed by SB 220 have no significant fiscal impact on the state. *Id.*

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[10] Petitioners note that the Texas Legislature made no explicit fact findings regarding docket backlog or any other interest to be advanced by SB 220.

In this case, Respondents not only failed to meet their burden of supplying evidence of a substantial reason for SB 220's discrimination against non-residents, but they also failed to prove as a matter of law that the discriminatory provisions of SB 220 bear a "substantial relation to the State's objectives." *Barnard*, 489 U.S. at 552. As the trial court concluded—and as the Texas Supreme Court did not deny—Texas could have used less restrictive alternatives to SB 220 to address any concern that non-resident asbestos claims were unduly burdening its courts.

The most obvious available alternative—one far less restrictive than the provisions of SB 220—would be to simply adopt the common law doctrine of forum non conveniens. Unlike the mandatory dismissal provision of section 71.052(b), the common law version of forum non conveniens provides for *discretionary* dismissal, based on a balancing of several factors. And unlike the prospective forum restrictions of section 71.051, the common law doctrine treats residence as merely one factor to balance, rather than as a threshold that determines whether the case must be dismissed.

Another less restrictive alternative had already been implemented in several Texas counties, where the courts created centralized asbestos dockets to handle common issues on a county-wide basis. *See* App. 77-80a. As the testimony of district court judges Scott Link and Anne Ashby revealed to the Legislature, such centralized dockets are in place and working in both Harris and Dallas counties, where thousands of asbestos claims are filed each year.

As a third less restrictive alternative, the Legislature could have simply offset any supposed incremental additional costs imposed on the Texas courts by out-of-state cases by requiring non-resident plaintiffs to pay higher filing fees. In fact, any combination of the three alternatives discussed here would still prove far less restrictive than the forum restriction provisions of SB 220.

Because Respondents did not meet their evidentiary burden of establishing a substantial reason justifying the discrimination against out-of-state residents embodied in both sections 71.052 and 71.051 of SB 220, and because those

discriminatory provisions do not bear a substantial relationship with the State's objectives, those sections of SB 220 violate the Article IV Privileges and Immunities Clause.[11]

II. Application of the Texas Borrowing Statute To Alabama Asbestos Claimants Violates the Article IV Privileges and Immunities Clause because the Alabama Claimants Have Had No Reasonable Opportunity To Pursue Their Claims, A Right Guaranteed To Texas Residents.

This case also merits consideration because it raises an issue that will inevitably recur as conflicts between state constitutional rights and legislative "tort reform" efforts mature in the politically-sensitive state courts: When, if ever, does the Privileges and Immunities Clause of Article IV permit a state to withhold from non-citizens the state constitutional protections it extends to its own citizens?

In this case, the Texas court rejected a state constitutional challenge to the borrowing provision of SB 220, as applied to Alabama asbestos plaintiffs, even though the open courts provision in Article I, Section 16 of the Texas Constitution would prevent the legislature from applying the same limitations rules to Texas citizens. App. 26a. Relying on this Court's decision in *Canadian Northern Railway v. Eggen*, 252 U.S. 553 (1920), the court also held that, as applied to Alabama asbestos victims, the Texas borrowing statute does not violate the Privileges and Immunities Clause, apparently based on the court's view that the borrowing statute affords Alabama asbestos victims a reasonable time in which to file

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[11] The Texas Supreme Court concluded that section 71.052 (section 2 of SB 220) was exempt from review under the Privileges and Immunities Clause because it does not discriminate on the basis of the plaintiffs' residence at the time suit is filed. App. 38a. This is clearly wrong. As a practical matter section 71.052 discriminates against non-residents because Texas residents can merely refile their lawsuits in Texas following dismissal under section 71.052, and they will then be exempt from dismissal by virtue of the exception for Texas residents found in section 71.051(e). App. 40a.

their claims. App. 29a. In both instances—just as it did when it reviewed SB 220's forum restriction provisions—the court disregarded the well-established requirement that any discrimination against non-residents of a state must be substantially related to a substantial governmental interest in order to pass constitutional muster. *See, e.g., Barnard*, 489 U.S. at 552.

In *Eggen*, this Court upheld a Minnesota borrowing statute, which, as applied, barred a cause of action arising from an accident that occurred in Canada almost two years before the plaintiff filed his suit in Minnesota. 252 U.S. at 561. The plaintiff had failed to file suit within Canada's one-year statute of limitations and sought the benefit of Minnesota's two-year limitations period, claiming that Minnesota's borrowing provision violated the Privileges and Immunities Clause because it contained an exemption for Minnesota citizens. *Id.* at 559. The Court upheld the Minnesota statute, reasoning that the plaintiff's own neglect had caused his predicament, since Canadian law had given him one year in which to file suit: "A man cannot be said to be denied, in a constitutional or in any rational sense, the privilege of resorting to courts to enforce his rights when he is given free access to them *for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection.*" *Id.* at 562 (emphasis added).

The *Eggen* decision has often been cited in support of the well-established proposition that equal access to courts is a right protected by the Privileges and Immunities Clause. *See, e.g., United States v. Baldwin*, 436 U.S. 371, 387 (1978). The principles announced in *Eggen* have remained a touchstone for cases involving constitutional challenges to state borrowing statutes. *See, e.g., Miller v. Stauffer Chem. Co.*, 581 P.2d 345 (Idaho 1978). But the exception carved out in *Eggen* for differential treatment under a statutory choice-of-law rule that provides substantial equality for non-citizens by allowing them a "reasonable" opportunity for access to the state's courts—like the residency–citizenship distinction in *Douglas*—preceded this Court's shift from a natural rights analysis to the modern approach introduced in *Toomer v. Witsell.*

While the *Eggen* decision has been reconciled with this Court's contemporary Privileges and Immunities Clause jurisprudence, *see, e.g., Baldwin*, 436 U.S. at 387, the Texas court's mechanical reliance on *Eggen* to justify the result *in this case* is mistaken.

This is not the first case to present a conflict between the protections afforded by the Texas Constitution and legislative "tort reform" measures designed to curb liability by applying an absolute statute of limitations to bar claims by the victims of latent injuries. In *Nelson v. Krusen*, a Texas citizen challenged a newly-enacted statute of limitations that barred all medical malpractice claims filed more than two years from the date of injury, regardless of whether the injured party could have discovered the existence of the claim within the limitations period. The Texas Supreme Court held that the Texas constitutional open courts provision protects citizens from legislative acts that abridge the right to sue before the injured party has a reasonable opportunity to discover the wrong and bring suit. *See Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984); *accord Neagle v. Nelson*, 685 S.W.2d 11, 12 (Tex. 1985); *see generally S.V. v. R.V.*, 933 S.W.2d 1 (Tex. 1996). The *Krusen* court condemned the application of an absolute statute of limitations precisely because it did not give latent injury victims a reasonable opportunity to bring suit, explaining that when claimants are barred for failing "to sue before they had any reason to know they should sue . . . [this result] is rightly described as 'shocking' and is so absurd and so unjust that it ought not be possible." 678 S.W.2d at 923.

In this case, however, the Texas court held that the *same* result it condemned as "shocking," and "so absurd and so unjust that it ought not be possible" in *Krusen* was not "unreasonable" when the claims of Alabama citizens asserted in the Texas courts were at stake. The court explained that the statute did not violate the Texas open courts guarantee because the right of these Alabama plaintiffs to seek redress in Texas courts—which had previously existed under Texas common law—"cannot be said to be unreasonably abrogated by the borrowing statute when it remains the same under

Alabama law as it was before." App. 25a. According to the court, this application of the borrowing statute bears a "real relationship" to the legislative goal of "prevent[ing] plaintiffs from gaining greater rights than they would have had in the state where the cause of action arose simply by filing suit in Texas." App. 25a.

The Texas court's discriminatory refusal to extend to non-citizens the Texas constitutional guarantee of a reasonable opportunity to discover their wrongs and bring suit cannot survive when subjected to "intermediate" constitutional scrutiny under the Privileges and Immunities Clause. *See, e.g., Barnard*, 489 U.S. at 552. Here once again, "the burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 116 S. Ct. at 2275. *Eggen* does not insulate the Texas borrowing statute from constitutional scrutiny, because it does not speak to the problem that arises when a state uses a borrowing statute to apply to non-citizens a rule that it could not impose on its own citizens under its own state constitution.

The governmental interest articulated by the Texas court—prevention of overcrowding of Texas courts as a result of "forum shopping"—does not constitute a substantial reason justifying application of an absolute statute of limitations to claims by non-residents when out-of-state claims by Texas citizens are not subject to the same rule. *Barnard*, 489 U.S. at 555 ("[A] State, or a Territory to which the Privileges and Immunities Clause applies, may not solve the problem of congested court dockets by discriminating against nonresidents."); *see also Craig*, 429 U.S. at 198 ("[A]dministrative ease and convenience" are insufficient state interests under intermediate scrutiny); *Reed*, 404 U.S. at 76 (holding "reducing the workload on probate courts" insufficient). Moreover, a trial court does not even reach application of the borrowing statute unless the court has already determined under section 71.051 that the plaintiff's claims have a sufficient connection with the state to survive forum non conveniens dismissal. Imposition of a discriminatory borrowing provision as an additional step to prevent "forum shopping" by non-residents is no more than arbitrary discrimination against the plaintiffs

based on "the mere fact that they are citizens of other states." *Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978).

Nor can the result reached by the Texas court be reconciled with the *Eggen* court's allowance for differential treatment that permits the non-citizen litigant "a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings." 252 U.S. at 562. Unlike the careless plaintiff in *Eggen*, the Petitioners here, like all other Alabama asbestos victims, never knew they had claims at the time their claims were barred under Alabama law, and they thus never had an opportunity to file suit within Alabama's limitations rule. *Even the Texas court* has agreed that when an injured person cannot discover the injury that gives rise to the claim within the statutory limitations period, application of an absolute statute of limitations deprives the injury victim of a reasonable opportunity to bring suit. *See Krusen*, 678 S.W.2d at 923; *Childs v. Haussecker*, 974 S.W.2d 31, 38 (Tex. 1998).

Despite the Texas court's suggestion it *had* to find the Alabama statute reasonable because the Alabama court had upheld the statute under Alabama law, App. 29a, neither the Full Faith and Credit Clause of the Constitution nor the Due Process Clause of the Fourteenth Amendment compels Texas to bar these claims in deference to the Alabama rule. *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (holding that the application of the forum state's statute of limitations to a claim governed by the substantive law of a different state did not violate the Full Faith and Credit Clause or the Due Process Clause). And, under the Privileges and Immunities Clause, Texas cannot properly justify its discrimination based simply on the fact that the plaintiffs receive the same treatment under Alabama law. The constitutionality of one state's laws that discriminate against non-residents under the Privileges and Immunities Clause does not depend on the laws of the non-residents' home state. *See Austin v. New Hampshire*, 420 U.S. 656, 668 (1975); *accord Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, ___, 118 S. Ct. 766, 781 (1998). The relevant comparison is between the forum state's treatment of its own residents and its treatment of non-residents—the laws of the non-residents' own states are

irrelevant to whether the forum state's discrimination is substantially related to a substantial governmental objective.

Lastly, invalidation of the Texas statute, as applied to Alabama residents, would not, as the Texas court suggested, App. A at 28a, 29a, inevitably require this Court to strike down nearly every state's borrowing statute or force all states with a discovery rule to become a forum for Alabama asbestos claims. Not all borrowing statutes will give rise to the state and federal constitutional problems seen here: for example, several states have adopted the Uniform Conflict of Laws Limitations Act, which recognizes that application of a longer limitations period than the non-resident's home state permits is appropriate when the law of the home state "has not afforded a fair opportunity to sue upon . . . the claim." *See, e.g.*, COLO. REV. STAT. § 13-82-106 (1997); N.D. CENT. CODE § 28-01.2-04 (1999); WASH. REV. CODE § 4.18.040 (1988). Any borrowing statute could impose a shorter statute of limitations on non-residents without violating any of the state's constitutional guarantees, so long as the shorter period allowed litigants a reasonable time to file suit. And constitutional limits on personal jurisdiction prevent a state from being "forced" to become a forum for asbestos claims against a defendant that has not established minimum contacts in that state or that is not amenable to service under the state's long-arm statute. *See, e.g., Asahi Metal Indus. v. Superior Court of California*, 480 U.S. 102, 112 (1987) (holding that a California state court could not exercise personal jurisdiction over a Japanese corporation under the Due Process Clause of the Fourteenth Amendment); *CSR, Ltd. v. Link*, 925 S.W.2d 591, 594 (Tex. 1996) (holding that a Texas state court lacked jurisdiction over an asbestos manufacturer because the requirements of the Texas long-arm statute and the Due Process Clause were not satisfied).

This case merits the Court's attention because the fundamental conflicts created by nationwide citizenship under inconsistent state constitutional protections extend far beyond the specific circumstances of the Alabama asbestos victims. Many state courts are presently seeking to balance state constitutional rights that exceed the rights granted in the United

States Constitution against widespread demands for tort reform measures such as damage caps, higher standards for liability, and various procedural rules such as the statute at stake here. *See, e.g., Academy of Trial Lawyers v. Seward*, ___N.E.2d___ (No. 97-2419) (Ohio Aug. 16, 1999) (Slip op.) (striking down comprehensive tort reform legislation that attempted to overrule earlier Ohio Supreme Court decisions declaring certain tort reform measures unconstitutional). Predictably, some state courts conclude that popular tort reform measures contravene state constitutional protections, and others reach the opposite result because they construe the state constitutional rights of their citizens more narrowly. *Compare, e.g., Lakin v. Senco Prods., Inc.*, ___ P.2d ___, 1999 WL 498088 at *9 (Or. July 15, 1999) (No. S44110) (holding that a cap on non-economic damages for bodily injury violates the state constitution's guarantee of a trial by jury) *and Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 601-02 (Ind. 1980) (upholding damage caps against state constitutional challenges). These inconsistent decisions set the stage for choice-of-law problems in the future that will require the state and the federal courts to decide how a forum state's constitutional guarantees affect non-citizens who do not enjoy the same rights elsewhere.

The Texas Supreme Court's disregard for contemporary Privileges and Immunities jurisprudence, and its arbitrary refusal to grant non-citizens the same state constitutional protections it extends to its own citizens, compel issuance of a writ of certiorari.

III. This Court Should Clarify That Arbitrary Timing Classifications Cannot Survive Scrutiny Under the Fourteenth Amendment's Equal Protection Clause.

Not only does SB 220's discrimination against non-residents merit review by this Court under the Privileges and Immunities Clause of Article IV, but this Court should also grant certiorari to consider, under the Fourteenth Amendment's Equal Protection Clause, the propriety of that statute's further discrimination based on the timing of the filing of

non-resident asbestos victims' lawsuits. Because there is no rational basis to sustain the legislation's arbitrary, date-based classifications, the Texas law should not survive equal protection scrutiny.

The central timing-based discrimination in SB 220 relates to the mandatory dismissal provision. The new section 71.052(b) applies to non-residents' asbestos cases filed from January 1, 1997 through May 28, 1997. By contrast, all cases (asbestos or otherwise) filed by non-residents on or after the enactment of SB 220 on May 29, 1997, are subject to dismissal only at the discretion of the trial court under section 71.051, which more closely mirrors the common law doctrine of forum non conveniens. In other words, non-resident asbestos victims who had already filed their lawsuits by the time SB 220 went into effect are treated *more* harshly than similarly situated out-of-state asbestos victims who file their lawsuits *after* the enactment of the new law.

Despite the clever effort by the Texas Supreme Court to concoct a rational basis for the Texas legislature's confusing and bizarre statutory classification scheme, even that court was unable to articulate a genuine reason why out-of-state asbestos victims whose lawsuits were pending at the time of the law's enactment are treated worse than claimants who file their cases later. According to the Texas court, the classification is rational because

> [t]he Legislature reasonably believed that Texas's resources were better spent on cases having a more substantial relation to Texas, and that Texas residents were being denied access to their own courts because of a backlog of cases the Legislature reasonably believed should be litigated elsewhere.

App. 45a. Thus, according to the Texas Supreme Court, mandatory dismissal of cases filed prior to the enactment of SB 220 was rational because the Texas legislature had made a policy decision that those pending cases "should be litigated elsewhere," and requiring trial courts to conduct hearings and exercise discretion in considering whether to dismiss those cases would waste "significant court resources." App. 47a.

The Texas court's imagined justification for the timing-based discrimination of SB 220 simply does not wash. If, as the court speculates, the legislature had "reasonably believed" the cases subject to mandatory dismissal "should be litigated elsewhere," just what was it about those cases that made them *more* problematic for the Texas court system than out-of-state cases filed *after* the enactment of SB 220? Presumably, at least *some* of the cases that were subject to mandatory dismissal would actually survive dismissal under the prospective test of section 71.051, as the Texas Supreme Court acknowledges. App. 47a. Yet even though section 71.051 sets the prospective standard for what types of claims by non-residents should be permitted to proceed in Texas courts, the Legislature nonetheless determined that certain non-resident asbestos claimants who would meet that prospective standard should have their cases automatically dismissed. This decision was not rational and denied Petitioners equal protection of the law. *See, e.g., Binney v. Long*, 299 U.S. 280, 293 (1936).

CONCLUSION

This Court should grant the petition for certiorari to clarify that states may not arbitrarily discriminate against non-residents in granting access to their courts, and that they may not establish irrational timing classifications.

Respectfully submitted,

Steve Baughman
Counsel of Record
Alicia Butler
Baron & Budd, P.C.
3102 Oak Lawn Ave.,
Suite 1100
Dallas, Texas 75219
214-521-3605

Counsel for Petitioners

September 29, 1999

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 97-1162

Owens Corning, et al., Appellants

v.

Hilliard Carter, Appellee

– *consolidated with* –

No. 97-1163

Owens Corning, et al., Appellants

v.

James B. Carroll, et al., Appellees

– *consolidated with* –

No. 97-1164

Owens Corning, et al., Appellants

v.

George R. Aday, et al., Appellees

– *consolidated with* –

No. 97-1165

Owens Corning, et al., Appellants

v.

Larry R. Chandler, et al., Appellees

– *consolidated with* –

No. 97-1166

Owens-Corning Fiberglas Corporation, Owens Corning, Pittsburgh Corning Corporation, Minnesota Mining & Manufacturing Co., A. P. Green Industries, Inc., Armstrong World Industries, Certainteed Corp., Dana Corp., Quigley Company, Inc., et al., Appellants

v.

Austin E. Deford, et al., Appellees

On Direct Appeal from the 250th District Court of Travis County, Texas

Argued on September 9, 1998

Justice Abbott delivered the opinion of the Court.

Justice Hankinson did not participate in the decision.

In these consolidated direct appeals we consider the constitutionality of sections 71.031(a)(3), 71.051, and 71.052(b) and (c) of the Texas Civil Practice and Remedies Code. Section 71.031(a)(3) is a borrowing statute, which provides that a foreign plaintiff's action for personal injury or death arising out of state must be brought in Texas within the limitations period provided by the law of the state in which the wrongful act, neglect, or default took place. Several Alabama plaintiffs whose asbestos claims arose in Alabama challenged the constitutionality of section 71.031(a)(3) as applied to them because their claims, which were timely under Texas's statute of limitations, were barred by Alabama's statute of limitations. The trial court held that section 71.031(a)(3) is unconstitutionally retroactive as applied to "any Alabama asbestos plaintiff whose cause of action had accrued under Texas law but was not yet barred as of May 29, 1997," the effective date of the borrowing statute. We consider whether section 71.031(a)(3) is unconstitutionally retroactive, whether it violates the open courts provision of the Texas Constitution, and whether it violates the Privileges and Immunities Clause of Article IV of the United States Constitution.

Section 71.051 is Texas's law of forum non conveniens in all actions for personal injury or death. Although the statute allows a court to dismiss a foreign plaintiff's claim under the doctrine of forum non conveniens, it provides that a court may not stay or dismiss a plaintiff's claim if the plaintiff is a legal resident of Texas. The trial court

held that section 71.051 does not violate the Privileges and Immunities Clause, and Plaintiffs challenge that holding on appeal.

Section 71.052 contains provisions requiring a court to dismiss any asbestos claim in which the plaintiff was not a resident of Texas at the time the claim arose and the claim arose outside of Texas. If the asbestos claim was filed on or after January 1, 1997 and was pending on May 29, 1997, the court must, on motion of a defendant, dismiss the claim if the defendant files certain stipulations. If the asbestos claim was filed on or after August 1, 1995, but before January 1, 1997, and was pending on May 29, 1997, the court must, on a defendant's motion and filing of certain stipulations, dismiss the claim unless the plaintiff files a written statement electing to either abate the claim for 180 days to afford the plaintiff an opportunity to file a new claim in another forum or to submit to a cap on punitive damages. The trial court held that sections 71.052(b) and (c), the dismissal provisions, violate the Privileges and Immunities Clause. We consider whether sections 71.052(b) and (c) violate the Privileges and Immunities Clause, and whether section 71.052(b) violates the Equal Protection Clauses of the Texas and United States Constitutions or the special laws provision of the Texas Constitution.

We affirm the trial court's judgment that section 71.051 does not violate the Privileges and Immunities Clause. But, contrary to the trial court, we hold that sections 71.052(b), 71.052(c), and 71.031(a)(3) do not violate any of the constitutional provisions asserted by Plaintiffs. Accordingly, we affirm in part and reverse in part.

I

Facts

Plaintiffs brought five separate lawsuits[1] in Texas against Owens Corning (formerly Owens-Corning Fiberglas Corporation), Pittsburgh Corning, A.P. Green Industries, Armstrong World Industries, CertainTeed Corporation, Dana Corporation, Quigley Company, United States Gypsum, Minnesota Mining & Manufacturing Co., and W.R. Grace & Company-Connecticut ("Owens Corning") and other defendants[2] for personal injuries resulting from asbestos exposure. Four of the actions (*Chandler, Carroll, Carter,* and *Aday*) were filed in August 1995, while the *Deford* lawsuit was filed on May 5, 1997. All Plaintiffs were citizens and residents of states other than Texas when the alleged exposures occurred and when they filed their lawsuits in Texas. The actions were maintained according to Texas Civil Practice and Remedies Code section 71.031, which governs claims for death or personal injury caused by acts or omissions occurring out of state.

When the plaintiffs filed their suits, section 71.031 provided that an action for damages for death or personal injury to a citizen of another state could be enforced in Texas courts even though the wrongful act, neglect, or default causing the death or injury took place in a foreign

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[1] The suits were styled *Deford, et al. v. Owens-Corning Fiberglas, et al.; Chandler, et al. v. Owens Corning, et al.; Carrol, et al. v. Owens Corning, et al.; Carter et al. v. Owens-Corning, et al.;* and *Aday, et al. v. Owens-Corning, et al.*

[2] Although Plaintiffs sued a number of other defendants, only the named defendants are parties to this appeal.

state if: (1) a law of the foreign state or of Texas gave a right to maintain an action for damages for the death or injury; and (2) the action was begun within the time provided by Texas law. Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 71.031, 1985 Tex. Gen. Laws 3242, 3297. In addition, the law then in effect provided that a court could not stay or dismiss an action on the basis of forum non conveniens if it was alleged that harm was caused by exposure to asbestos fibers. Act of Feb. 23, 1993, 73d Leg., R.S., ch. 4, § 1, sec. 71.051, 1993 Tex. Gen. Laws 10, 12.

A

In early 1997, the Legislature concluded that Texas law was too amenable to claims arising out of state and claims brought by foreign plaintiffs, and determined that this amenability crowded Texas courts with claims having little or no connection to Texas, at the expense of Texas residents. Additionally, the Legislature recognized that the asbestos exception to the forum non conveniens law made Texas an especially popular forum for a huge number of out-of-state asbestos claims.

The Legislature enacted Senate Bill 220, effective May 29, 1997, to address these concerns. Act of May 27, 1997, 75th Leg., R.S., ch. 424, 1997 Tex. Gen. Laws 1680. Senate Bill 220 changed Texas law in several significant ways. First, to discourage forum shopping by nonresidents with claims arising out of state, the Legislature amended section 71.031 by adding subsection (a)(3) – the borrowing statute. As amended, section 71.031(a)(3) provides that a plaintiff who is a resident of a foreign state, in an action

for damages for death or personal injury, may enforce the action in a Texas court although the wrongful act, neglect, or default causing the death or injury occurred in a foreign state, but only if the action is begun in Texas within the time provided both by Texas law and by the law of the foreign state in which the wrongful act, neglect, or default took place. Tex. Civ. Prac. & Rem. Code § 71.031(a)(3). Thus, section 71.031(a)(3) "borrows" another state's statute of limitations such that a foreign plaintiff whose cause of action for personal injury or wrongful death arose in a foreign state with a shorter limitations period than Texas's must file within the limitations period prescribed by that state's law.

Second, the Legislature amended section 71.051, the statutory forum non conveniens provision, to remove the asbestos exception, thereby permitting courts to dismiss asbestos claims the same as any other claim under the doctrine of forum non conveniens. The Legislature left in place section 71.051's provision exempting from dismissal claims filed by Texas residents. *See id.* § 71.051(e).

Third, the Legislature created section 71.052, which applies only to claims for personal injury or wrongful death in which: (1) the plaintiff was not a Texas resident when the claim arose; (2) the plaintiff's claim arose outside Texas;[3] and (3) the plaintiff's claim alleges that asbestos fiber exposure caused the harm. *Id.* § 71.052(a).

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[3] By statute, the claim arises in the state where the asbestos exposure allegedly occurred. *See* Tex. Civ. Prac. & Rem. Code § 71.052(h) ("A court shall determine that a claim arose in the jurisdiction in which the plaintiff was located at the time the plaintiff is alleged to have been exposed to asbestos fibers.").

Section 71.052 applies only to such actions pending on May 29, 1997, the effective date of the Act. Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 4(b), 1997 Tex. Gen. Laws 1680, 1683. As to these claims, section 71.052(b) provides that "[t]he court, on motion of a defendant, shall dismiss each claim against the defendant that is subject to this section and was filed in this state on or after January 1, 1997, on the filing of a stipulation by the defendant that, for purposes of limitations, the filing of the claim in another forum would relate back to the date each plaintiff filed his claim in this state." Tex. Civ. Prac. & Rem. Code § 71.052(b). Additionally, section 71.052(c) provides that, for each asbestos claim subject to section 71.052 filed on or after August 1, 1995 but before January 1, 1997, the court must dismiss the claim on a defendant's motion unless the plaintiff files a written statement electing either to abate the claim for 180 days in order to file an action in another state, or to retain the claim with a cap on punitive damages. *Id.* § 71.052(c). The court may not dismiss or abate a claim under either section 71.052(b) or 71.052(c) until the defendant files a stipulation that, with respect to a new action filed in another state, the plaintiff may elect to rely on discovery responses already provided. *Id.* § 71.052(f).

B

Owens Corning filed the requisite stipulations and moved to dismiss the *Deford* Plaintiffs' claims, arguing that those claims were subject to mandatory dismissal under section 71.052(b) because: (1) the Plaintiffs' asbestos exposure occurred out of state; (2) none of the Plaintiffs were residents of Texas when their claims arose;

and (3) the Plaintiffs' claims were filed after January 1, 1997 and were pending on May 29, 1997. The *Deford* suit included class action claims brought by two Alabama Plaintiffs – Raymond Lee Moore and Melvin Horton. These Plaintiffs challenged the constitutionality of sections 71.051, 71.052(b), and 71.031(a)(3) on their own behalf and on behalf of the class of "all non-Texas residents who have filed asbestos-related personal injury lawsuits in Texas state courts on or after January 1, 1997." They sought declaratory and injunctive relief preventing all Defendants from seeking to enforce these provisions.

Owens Corning filed a counterclaim and motion for class certification in the *Chandler, Aday, Carrol,* and *Carter* suits.[4] Owens Corning sought a declaratory judgment that section 71.052(c), which applies to claims filed after August 1, 1995 but before January 1, 1997, applies to the *Chandler, Aday, Carrol,* and *Carter* claims because they were filed after August 1, 1995 but before January 1, 1997 and were pending on May 29, 1997, and that section 71.052(c) is constitutional as applied to those claims. In response, Plaintiffs sought an injunction preventing Defendants from attempting to enforce section 71.052(c).

The trial court held a joint "trial" to consider the issues raised in all five cases. After hearing argument and receiving evidence, the court denied class certification and rendered interlocutory declaratory judgments in each suit. In the *Deford* action, the trial court declared section 71.031(a)(3) unconstitutional as applied and section

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[4] Because these suits were filed before January 1, 1997, section 71.052(b) does not apply to them.

71.052(b) unconstitutional on its face, and issued an order enjoining all Defendants from seeking to enforce these provisions. The trial court rejected the Plaintiffs' privileges and immunities challenge to section 71.051, and denied their request for injunctive relief. In the other four actions, the trial court declared section 71.052(c) unconstitutional as applied to certain plaintiffs who commenced suit between August 1, 1995 and September 1, 1995, and enjoined all Defendants from seeking to enforce the provision against those Plaintiffs.

II

Jurisdiction

Owens Corning asserts direct appeal jurisdiction premised on the trial court's enjoining all Defendants in the case from seeking to enforce sections 71.031(a)(3), 71.052(b), and 71.052(c). "An appeal may be taken directly to the supreme court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the constitutionality of a statute of this state." Tex. Gov't Code § 22.001(c); *see* Tex. Const. art. V, § 3-b.

Plaintiffs contend that jurisdiction is lacking because "the purported injunctive relief granted by the trial court below was actually no more than a declaratory judgment under another name." Plaintiffs argue that they sought injunctive relief to prevent the constitutional issues from being relitigated in other courts with respect to absent members of the putative class. Because the trial court denied class certification, Plaintiffs contend that the injunctions have no force or effect independent of the

trial court's interlocutory declaratory judgments in the individual suits and are therefore insufficient to confer direct appeal jurisdiction.[5] This argument is without merit. Plaintiffs sought temporary and permanent injunctive relief on their own behalf and on behalf of the putative class. The fact that they received an injunction solely on their own behalf does not transform the injunction into mere declaratory relief and does not deprive this Court of jurisdiction. The trial court issued orders granting and denying injunctive relief on the grounds of the constitutionality of Senate Bill 220, and each party has appealed. As such, the requirements of section 22.001(c) are satisfied.

III

Section 71.051

In their direct appeal, Plaintiffs challenge the trial court's denial of injunctive relief with regard to section 71.051. Plaintiffs contend that section 71.051 violates the Privileges and Immunities Clause of the United States Constitution, which provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, § 2, because, although it allows a court to dismiss a foreign plaintiff's claim under the doctrine of forum non conveniens, it does not permit a court to dismiss a claim if the plaintiff is a Texas resident.

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[5] Alternatively, Plaintiffs filed a cross direct appeal premised on the trial court's denial of injunctive relief relating to the alleged unconstitutionality of section 71.051.

Section 71.051 applies to all personal injury and wrongful death actions. It provides that, with respect to a plaintiff who is a legal resident of the United States, a claim or action may be dismissed in whole or in part if the party seeking to stay or dismiss the claim or action proves by a preponderance of the evidence that: (1) an alternative forum exists in which the claim or action may be tried; (2) that forum provides an adequate remedy; (3) maintenance of the claim or action in Texas courts would work a substantial injustice to the moving party; (4) the alternative forum can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim; (5) the balance of the private interests of the parties and the public interest of the state predominates in favor of the claim or action being brought in an alternative forum; and (6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation. Tex. Civ. Prac. & Rem. Code § 71.051(b). A court may not stay or dismiss a plaintiff's claim under subsection (b) if the plaintiff is a legal resident of Texas. *Id.* § 71.051(e). In addition, a court may not stay or dismiss a claim if a plaintiff makes a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in Texas. *Id.* § 71.051(f).

Owens Corning asserts that section 71.051 does not violate the Privileges and Immunities Clause because it is "legally indistinguishable" from a statute upheld by the Supreme Court in *Douglas v. New York, New Hampshire & Hartford Railroad*, 279 U.S. 377 (1929). In *Douglas*, the

New York courts, pursuant to statute,[6] had dismissed a suit brought by a citizen of Connecticut against a Connecticut corporation doing business in New York. The Supreme Court considered a privileges and immunities challenge to the statute, which the New York courts had construed to allow a court in its discretion to dismiss an action by a resident of another state, but not an action brought by a New York resident. *Id.* at 386. The Court noted that the statute discriminated on the basis of residence rather than citizenship, and held that the statute did not violate the Privileges and Immunities Clause because "[a] distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence." *Id.* at 387. The Court concluded that the statute was constitutional because "[t]here are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in the fact that broadly speaking it is they who pay for maintaining the Courts concerned." *Id.*

In *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1, 3-4 (1950), a later case citing *Douglas*, the Court stated:

> By reason of the Privileges-and-Immunities Clause . . . Missouri cannot allow suits by non-resident Missourians for liability under the Federal Employers' Liability Act arising out of conduct outside that State and discriminatorily deny access to its courts to a non-resident who

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[6] The statute provided that "[a]n action against a foreign corporation may be maintained by . . . a non-resident . . . only . . . [w]hen a foreign corporation is doing business within this State." *Douglas*, 279 U.S. at 386.

> is a citizen of another state. But if a State chooses to "[prefer] residents in access to often overcrowded Courts" and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control.

Relying on *Douglas* and *Mayfield*, many courts have followed the general rule that applying the doctrine of forum non conveniens to refuse jurisdiction in an action brought by a citizen of a foreign state does not violate the Privileges and Immunities Clause if jurisdiction would be refused in an action brought by a citizen of the forum state in the same circumstances.[7] A particular state may apply the doctrine of forum non conveniens, as long as it is applied to citizens and noncitizens alike. Accordingly, Texas might violate the Privileges and Immunities Clause by choosing to apply the doctrine of forum non conveniens to nonresident nonTexans while exempting nonresident Texans from its application.

Thus, if section 71.051 discriminates solely on the basis of *residence*, *Douglas* dictates that it may do so without

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[7] *See, e.g., Grovey v. Washington Nat'l Ins. Co.*, 119 S.W.2d 503 (Ark. 1938); *Price v. Atchison, T. & S. F. R.R.*, 268 P.2d 457 (Cal.), *cert. denied*, 348 U.S. 839 (1954); *Whitney v. Madden*, 79 N.E.2d 593 (Ill.), *cert. denied*, 335 U.S. 828 (1948); *Johnson v. Chicago, Burlington & Quinney R.R. Co.*, 66 N.W.2d 763 (Minn. 1954); *Loftus v. Lee*, 308 S.W.2d 654, 657 (Mo. 1958); *Elliott v. Johnston*, 292 S.W.2d 589, 595 (Mo. 1956); *Gore v. United States Steel Corp.*, 104 A.2d 670 (N.J.), *cert. denied*, 348 U.S. 861 (1954); *St. Louis-San Francisco Ry. Co. v. Superior Court*, 276 P.2d 773 (Okla. 1954) & 290 P.2d 118 (Okla. 1955); *Zurick v. Inman*, 426 S.W.2d 767, 770 (Tenn. 1968); *Mooney v. Denver & Rio Grande W. R.R.*, 221 P.2d 628 (Utah 1950).

running afoul of the Privileges and Immunities Clause. If, however, section 71.051 discriminates on the basis of *citizenship*, *Mayfield* indicates that such discrimination might be unconstitutional. Owens Corning contends that the statute, which prohibits dismissal if the plaintiff is a "legal resident" of Texas, falls in the former category; Plaintiffs contend it is the latter because the statute's definition of "legal resident" effectively permits nonresident Texas citizens to survive dismissal.

The statute defines "legal resident" as "an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absences, without regard to the individual's country of citizenship or national origin." Tex. Civ. Prac. & Rem. Code § 71.051(h). Because of the broad definition of "legal resident," Plaintiffs argue that section 71.051(e) would preclude dismissal of a claim brought by a Texas citizen temporarily residing in Alabama (as long as that person intended Texas to be his permanent residence) whose injuries arose in Alabama, even when the forum non conveniens factors favor dismissal and even though a similarly situated Alabama citizen's claim would be dismissed. As such, Plaintiffs assert, the statute effectively precludes dismissal of claims arising out of state brought by nonresident Texas citizens but allows dismissal of claims arising out of state brought by nonresident noncitizens, a result that violates the Privileges and Immunities Clause under *Douglas* and *Mayfield*.

The Supreme Court addressed a similar argument in *Douglas*, in which the plaintiffs contended that, although the

statute used the term "nonresident," it effectively "authorize[d] the Court in its discretion to dismiss an action by a citizen of another State but not an action brought by a citizen of New York." 279 U.S. at 386. The *Douglas* plaintiffs argued that because a citizen of New York is a resident of New York wherever he may be living, all citizens of New York could bring suit, whereas citizens of other states could not unless they were actually living in New York. *Id.* In response, the Supreme Court construed the term "resident" in the strict primary sense of "one actually living in the place for the time, irrespective even of domicile." *Id.*; *see also Loftus v. Lee*, 308 S.W.2d 654, 657 (Mo. 1958) (noting that, in *Douglas*, the term "nonresident" was interpreted to embrace citizens of New York who did not actually live in the state at the time suit was brought). So construed, the statute "applie[d] to citizens of New York as well as to others and put[ ] them on the same footing. There [was] no discrimination between citizens as such, and none between nonresidents with regard to the[ ] foreign causes of action." *Douglas*, 279 U.S. at 387.

The crux of Plaintiffs' argument is that, unlike the statute in *Douglas*, a Texas citizen temporarily residing in Alabama but simply intending Texas to be his permanent home may take advantage of section 71.051(e). Owens Corning contends that the statutory definition of "legal resident" simply tracks the definition of residence in the Election Code, *see* Tex. Elec. Code. § 1.015, and this definition is not equated with Texas citizenship; instead, the definition of "legal resident" in section 71.051 may be construed to exclude nonresident Texas citizens, thereby treating them the same as nonresident noncitizens.

Owens Corning contends that we are obligated to construe the statute in this manner to avoid constitutional infirmities. *See* Tex. Gov't Code § 311.021(1); *see also Douglas*, 279 U.S. at 387. We agree.

The definition of "legal resident" in 71.051 is largely similar to the definition in the Election Code.[8] Both provide that the person must intend the place to be his home or permanent residence, to which he intends to return after temporary absences. But a significant difference is section 71.051's addition of the clause "despite temporary residence elsewhere." Although Plaintiffs contend that this language prohibits Texas courts from dismissing claims by nonresident Texas citizens and thus renders the statute constitutionally infirm, we disagree that the quoted language creates such a prohibition. Rather, we hold that section 71.051 plainly requires that the plaintiff be a resident of Texas to avoid dismissal. *See* Tex. Civ.

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[8] The Election Code provides:

> (a) In this code, "residence" means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence.
>
> (b) Residence shall be determined in accordance with the common-law rules, as enunciated by the courts of this state, except as otherwise provided by this code.
>
> (c) A person does not lose the person's residence by leaving the person's home to go to another place for temporary purposes only.
>
> (d) A person does not acquire a residence in a place to which the person has come for temporary purposes only and without the intention of making that place the person's home.

Tex. Elec. Code § 1.015.

Prac. & Rem. Code § 71.051(e) ("The court may not stay or dismiss a plaintiff's claim . . . *if the plaintiff is a legal resident of this state.*") (emphasis added); *see also id.* § 71.051(h)(1).

Under section 71.051(h)(1), a person's place of "legal residence" is the specified political subdivision intended to be the person's permanent residence. *Id.* § 71.051(h)(1). A person may have a legal residence in Texas "despite temporary residence elsewhere or despite *temporary* absences." *Id.* (emphasis added). With regard to a person who has a "temporary residence elsewhere," the statute assumes the existence of two residences – one permanent, one temporary. To take advantage of section 71.051(e), a person's permanent residence must be in Texas. *Id.* § 71.051(e). The statute does not define "permanent residence." Accordingly, we look to the generally accepted meaning of the term. With respect to individuals, "residence" means the "[p]lace where one actually lives or has his home; a person's dwelling place or place of habitation; . . . a dwelling house." Black's Law Dictionary 907 (abridged 6th ed. 1991). In addition, although intent is *necessary* to establish a permanent residence, it alone is not sufficient to establish a permanent residence. *See Mills v. Bartlett*, 377 S.W.2d 636, 637 (Tex. 1964) ("Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined."). Thus, a permanent residence in Texas requires a home and fixed place of habitation to which a person intends to return when away. Cf. Tex. Elec. Code § 1.015. So construed, section 71.051 does not discriminate between nonresident citizens and nonresident noncitizens.

Plaintiffs also contend that we may not rely on *Douglas* because it is no longer good law. Plaintiffs assert that, in upholding the constitutionality of the statute, the *Douglas* Court relied on a now "discarded" distinction between residents and citizens. Plaintiffs cite a number of Supreme Court cases decided after *Douglas* in which the Court has stated that the distinction is largely irrelevant for purposes of the Privileges and Immunities Clause. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 278 n.6 (1985). In addition, Plaintiffs contend that modern Privileges and Immunities analysis requires the courts to determine whether less restrictive means are available, and that section 71.051 could not withstand such scrutiny. *See, e.g., Barnard v. Thorstenn*, 489 U.S. 546, 552-53 (1989).

Although Plaintiffs are correct that modern privileges and immunities law differs from that announced in *Douglas*, *see Toomer v. Witsell*, 334 U.S. 385 (1948), and the distinction between residents and citizens is in disfavor in most contexts, we are nonetheless bound to follow *Douglas* because it has never been overruled by the Supreme Court. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *In re Smith Barney, Inc.*, 975 S.W.2d 593, 598 & n.27 (Tex. 1998) (same); *see also Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 462 (11th Cir. 1996) ("[W]e are not at liberty to disregard binding case

law that is so closely on point and has been only weakened, rather than directly overruled, by the Supreme Court."). And, as noted previously, courts continue to rely on *Douglas*, despite later developments in privileges and immunities jurisprudence. Moreover, *Mayfield*, which reiterated the holding in *Douglas*, was decided after the so-called "modern" privileges and immunities analysis was adopted. Thus, we are bound by *Douglas* unless and until the Supreme Court overrules it.

IV

Section 71.031(a)(3)

Under the borrowing statute, foreign plaintiffs must commence their suits both within the time provided by Texas law and "within the time provided by the laws of the foreign state . . . in which the wrongful act, neglect, or default took place." Tex. Civ. Prac. & Rem. Code § 71.031(a)(2), (3). The borrowing statute applies to all personal injury and wrongful death actions. Thus, a foreign plaintiff whose cause of action for personal injury or wrongful death arose in a foreign state with a shorter limitations period than Texas's must file within the limitations period prescribed by that state's law.

There is no dispute that Plaintiffs' claims would be subject to Texas's statute of limitations under the law as it existed before adoption of the borrowing statute. *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, sec. 71.031, 1985 Tex. Gen. Laws 3242, 3297. For some Alabama plaintiffs such as Moore and Horton whose claims would likely be timely if governed by Texas's limitations law, application of Alabama's statute of limitations via the borrowing statute now bars their claims. These Plaintiffs

contended below, and the trial court held that, as applied to them, section 71.031(a)(3) violates Article I, Section 16 of the Texas Constitution. Plaintiffs also contend that section 71.031(a)(3) violates open courts and the Privileges and Immunities Clause. We disagree with each of these contentions.

A

Plaintiffs contend that applying the borrowing statute to certain of the Plaintiffs' claims violates Article I, Section 16 of the Texas Constitution, which provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Plaintiffs argue that the borrowing provision, which applies to all suits filed on or after the effective date of the Act, cuts off their accrued claims without providing a reasonable grace period after the Act's effective date in which to file their claims, and is therefore unconstitutionally retroactive. The trial court agreed, and ruled that section 71.031(a)(3) is unconstitutionally retroactive as applied to "any Alabama asbestos plaintiff whose cause of action had accrued under Texas law but was not yet barred as of May, 29, 1997," the effective date of the borrowing statute. Owens Corning challenges that ruling in its direct appeal.

In finding section 71.031(a)(3) unconstitutionally retroactive, the trial court relied on the principle that the Legislature can pass legislation affecting a remedy for an accrued cause of action without violating Article I, Section 16, if it affords a reasonable time or fair opportunity to preserve a claimant's rights under the former law. We

recently reaffirmed this principle in *City of Tyler v. Likes*, 962 S.W.2d 489, 502 (Tex. 1997). There, we held that application of an amended statute defining a municipality's sovereign immunity was not unconstitutionally applied because, although the amendment affected the plaintiff's remedy by rendering the defendants immune, the Legislature allowed a reasonable time for the plaintiff to preserve her rights under the old law. *Id.* This Court has also held that when the Legislature shortens an existing statute of limitations or creates one where none had existed, it must provide a reasonable time for plaintiffs to bring suit after the enactment of the new law. *Mellinger v. City of Houston*, 3 S.W. 249, 254-55 (Tex. 1887) ("[I]f a statute of limitations applied to existing causes barred all remedy, or did not afford a reasonable period for their prosecution . . . such legislation would be retrospective, within the intent of the prohibition, and would therefore be wholly inoperative."); *De Cordova v. City of Galveston*, 4 Tex. 470, 480 (1849). Because the Legislature did not provide a grace period, the trial court concluded that applying section 71.031(a)(3) to bar accrued claims was unconstitutional. We now determine whether the Legislature violated Article I, Section 16 by directing that the borrowing statute be applied to bar accrued claims without allowing affected parties a reasonable grace period for filing their claims after its enactment. We hold that such application does not violate Article I, Section 16 of the Texas Constitution.

The prohibition against retroactive laws derives largely from the sentiment that such laws unfairly deprive people of legitimate expectations. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Considerations of fair

notice, reasonable reliance, and settled expectations play a prominent role when a state legislature shortens an existing statute of limitations for causes of action arising in that state or when it creates an immunity where none existed before, thereby disrupting settled expectations and extinguishing accrued causes of action. Here, where the Alabama plaintiffs failed to sue within the time period allotted by Alabama law – the state in which they live and in which the cause of action arose – and brought suit in Texas to avoid Alabama's time bar, such concerns play a minimal role and do not justify the application of a grace period. *See In re TMI*, 89 F.3d 1106, 1116 (3d Cir. 1996), *cert. denied*, 519 U.S. 1017 (1997).

First, any "expectations" that Plaintiffs might have had with regard to Texas's limitations period are insufficient to require Texas to afford Plaintiffs a grace period. The borrowing statute did not significantly change existing law. Both Texas's and Alabama's statutes of limitations remain unchanged with respect to causes of action arising in each state. The borrowing statute simply provides that the statute of limitations of the state in which the wrongful act, neglect, or default occurred must be satisfied; it is essentially a codified choice-of-law rule governing the timeliness of actions. *See, e.g., Sautter v. Interstate Power Co.*, 567 N.W.2d 755, 760 n.4 (Minn. Ct. App. 1997); *Green Acres Enters., Inc. v. Freeman*, 876 S.W.2d 636, 639 (Mo. Ct. App. 1994); *Thimm v. Automatic Sprinkler Corp.*, 434 N.W.2d 842, 845 (Wis. Ct. App. 1988). Application of the limitations law of the state in which the Plaintiffs live and were allegedly injured, as directed by the borrowing statute, is not inequitable. *In re TMI*, 89 F.3d at 1113-14.

Second, requiring a grace period for otherwise time-barred claims would defeat the very purpose of the borrowing statute: a plaintiff should not be able to gain greater rights than he would have in the state where the cause of action arose and where he lives simply by bringing suit in Texas. *See Patch v. Playboy Enters., Inc.*, 652 F.2d 754, 756 (8th Cir. 1981) (per curiam); *Celotex v. Meehan*, 523 So. 2d 141, 143 (Fla. 1988); *Green Acres*, 876 S.W.2d at 639; *Gwaltney v. Stone*, 564 A.2d 498, 503 (Pa. Super. Ct. 1989) (purpose of borrowing statute is "to prevent a plaintiff who sues in Pennsylvania from obtaining greater rights than those available in the state where the cause of action arose"). Therefore, we decline to hold that Article I, Section 16 requires a grace period in this case and we reverse the trial court's holding that section 71.031(a)(3) is unconstitutional as applied to certain plaintiffs.

B

Plaintiffs also contend that application of the borrowing statute to bar their claims violates the open courts provision of the Texas Constitution, which provides that "[a]ll courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law." Tex. Const. art. I, § 13. The trial court held that the borrowing provision did not violate the open courts provision, and Plaintiffs challenge that ruling.

Among other guarantees, the open courts provision provides that " 'the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants'

constitutional right of redress.' " *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994) (quoting *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993)). Thus, to establish an open courts violation in this context, Plaintiffs must show that: (1) they have a well-recognized common-law cause of action that is being restricted; and (2) the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute. *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990).

Plaintiffs Horton and Moore argue that the borrowing provision unjustifiably cuts off their right to sue without a reasonable opportunity to discover the wrong and bring suit. This is so, Plaintiffs contend, because Texas courts must apply Alabama limitations law in asbestos cases brought by Alabama residents, but Alabama's statute of limitations does not provide a reasonable opportunity to discover the wrong because it requires asbestos victims to bring suit before they can discover their injuries. *See Garrett v. Raytheon Co.*, 368 So.2d 516, 521 (Ala. 1979) (holding that a cause of action for latent injuries caused by toxic exposure accrues at the time of the plaintiff's last exposure to the toxic substance). As such, Plaintiffs contend, the open courts provision should protect them from having their rights cut off through application of a limitations statute that fails to provide a reasonable opportunity to discover the injury. *See Weiner v. Wasson*, 900 S.W.2d 316, 319 (Tex. 1995). Owens Corning argues that Plaintiffs cannot satisfy their burden of proof because any restriction on Plaintiffs' rights is not unreasonable or arbitrary – the borrowing statute simply adopts the

restrictions imposed by the state where the cause of action arose and whose law gave rise to the claim.

In evaluating whether a statute violates the open courts provision, we consider both the general purpose of the statute and the extent to which the litigant's right is affected. *Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1983). The cause of action at issue is an Alabama plaintiff's personal injury claim arising in Alabama. The right to pursue that claim cannot be said to be unreasonably abrogated by the borrowing statute when it remains the same under Alabama law as it was before. The only right being restricted is the Alabama Plaintiffs' right to pursue that claim in Texas after it is time-barred in Alabama. The Legislature's adoption of section 71.031(a)(3) to restrict that right is a valid exercise of its police power.

It is within the authority of the Legislature to make reasoned adjustments in the legal system. *See Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985). As stated previously, the purpose of the borrowing provision is to prevent plaintiffs from gaining greater rights than they would have had in the state where the cause of action arose simply by filing suit in Texas. Because Texas, unlike most other states, had no borrowing statute, it had become a popular forum for plaintiffs whose claims were time-barred where they arose. The Legislature considered testimony and evidence revealing that such transitory actions diverted judicial resources and crowded the courts. The Legislature determined, as a matter of state policy, that Texas resources should not be expended on such transitory actions. These findings meet the test of an "important" state interest.

The Legislature recognized the need to "bring Texas into the mainstream"; it reasonably concluded that adopting a borrowing statute would alleviate these problems. The remedy – adoption of the borrowing statute – is directly related to the crisis identified by the Legislature and bears a real relationship to the articulated legislative goals. As such, it does not violate Article I, Section 13.

C

Last, Plaintiffs challenge the trial court's finding that the borrowing statute does not violate the Privileges and Immunities Clause of Article IV of the United States Constitution. Plaintiffs argue that the borrowing provision violates the Privileges and Immunities Clause because it only applies to claims brought by nonresidents. Thus, unlike nonresidents whose claims arose outside of Texas, Texas residents are not subject to the borrowing statute, even if their claims also arose outside of the state. We hold that the borrowing statute does not violate the Privileges and Immunities Clause.

The United States Supreme Court decided this very issue in *Canadian Northern Railway v. Eggen*, 252 U.S. 553 (1920). In that case, the Court addressed a challenge to Minnesota's borrowing statute, which stated that, "[w]hen a cause of action has arisen outside of this state and, by the laws of the place where it arose, an action thereon is there barred by lapse of time, no such action shall be maintain[ed] in this state unless the plaintiff be a citizen of the state who has owned the cause of action ever since it accrued." *Id.* at 558. The plaintiff was a citizen of South Dakota whose cause of action arose in Canada. Plaintiff's

personal injury claim was barred by Canada's one-year statute of limitations at the time plaintiff filed suit in Minnesota, although it would have been timely under Minnesota's six-year limitations period.

The Court held that Minnesota's borrowing statute did not violate the Privileges and Immunities Clause because "the constitutional requirement is satisfied if the non-resident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." *Id.* at 562. The Court reasoned:

> The laws of Minnesota gave to the non-resident respondent free access to its courts, for the purpose of enforcing any right which he may have had, for a year, – as long a time as was given him for that purpose by the laws under which he chose to live and work – and having neglected to avail himself of that law, he may not successfully complain because his expired right to maintain suit elsewhere is not revived for his benefit . . . for the sole purpose of prosecuting his suit.

Id. at 563. Thus, the Court concluded that "[t]he privilege extended to [plaintiff] for enforcing his claim was reasonably sufficient and adequate and the statute is a valid law." *Id.*

Plaintiffs acknowledge the existence of this controlling Supreme Court authority, but argue that it is inapplicable because, in contrast to the *Eggen* plaintiff who suffered an acute personal injury, the Alabama Plaintiffs suffered

from a latent toxic injury and were not given "a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings" because Alabama law does not apply the discovery rule to latent toxic injury cases.[9]

The fact that Alabama does not apply the discovery rule to the case at hand does not render application of its statute of limitations by Texas courts unreasonable. Eggen does not require all states with a discovery rule in latent toxic tort cases to become a forum for Alabama asbestos claims. In applying borrowing statutes, several courts have held that the law of the state where the action arose applies with regard to tolling provisions and accrual, even when those provisions are less favorable than those provided by the forum state. *See, e.g., Waldron*

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[9] The Alabama Code provided a one-year statute of limitations for all injuries not arising from contract. Ala. Code § 6-2-39 (1975) (amended 1985). In 1979, the Supreme Court of Alabama held that, with regard to asbestos exposure claims, the statute of limitations began to run on the date of last exposure. *Garrett v. Raytheon Co.*, 368 So. 2d 516, 521 (Ala. 1979). In 1980, the Alabama Legislature amended section 6-2-30 to provide that "a civil action for any injury to the person or rights of another resulting from exposure to asbestos . . . shall be deemed to accrue on the first date the injured party, through reasonable diligence, should have reason to discover the injury giving rise to such civil action." Ala. Code § 6-2-30. Although the statute was intended to apply to pending claims, the Alabama Supreme Court has held that it cannot be applied retroactively to actions already barred by limitations at the time of its enactment. *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263, 268-70 (Ala. 1981), *reaffirmed by Johnson v. Garlock, Inc.*, 682 So. 2d 25, 28 (Ala. 1996). Thus, Alabama's discovery rule for asbestos exposure cases generally applies only if the plaintiff was exposed after 1979.

v. Armstrong Rubber Co., 236 N.W.2d 722, 725 (Mich. Ct. App. 1975); *Gwaltney v. Stone*, 564 A.2d 498, 503 (Pa. Super. Ct. 1989). And at least one court has relied on *Eggen* to reject a Privileges and Immunities challenge to a borrowing statute even though the law of the state in which the action accrued did not provide a discovery rule for latent toxic exposure. *See Helinski v. Appleton Papers*, 952 F. Supp. 266, 274 (D. Md. 1997) (although Maryland had a three-year statute of limitations and discovery rule, the court applied Maryland's borrowing statute so that Virginia's statute of limitations, with no discovery rule, barred plaintiffs' claims for latent toxic exposure to carbonless copy paper, and cited *Eggen* for the proposition that the statute did not violate the Privileges and Immunities Clause). Plaintiffs cite no case to the contrary.

In essence, Plaintiffs petition this Court to hold that Alabama's statute of limitations is unreasonable, despite the fact that Alabama's statute of limitations has been upheld as constitutional by the Alabama Supreme Court. *See Johnson v. Garlock*, 682 So. 2d 25, 28 (Ala. 1996); *Tyson v. Johns-Manville Sales Corp.*, 399 So. 2d 263, 268-70 (Ala. 1981); *Garrett v. Raytheon*, 368 So. 2d 516, 521 (Ala. 1979). Moreover, Plaintiffs' position would require the invalidation of nearly every state's borrowing statute as applied to Alabama plaintiffs, a result decried by the Supreme Court in *Eggen*. *See Eggen*, 252 U.S. at 560.

For these reasons, we hold that section 71.031(a)(3) does not violate the Privileges and Immunities Clause of the United States Constitution.

V

Section 71.052

In the trial court, Plaintiffs brought several challenges to section 71.052 under the Texas and United States Constitutions. The trial court rejected the Plaintiffs' challenges to section 71.052(b) under Article III, Section 56 of the Texas Constitution and on equal protection grounds. However, the trial court agreed with the Plaintiffs that sections 71.052(b) and (c) violate the Privileges and Immunities Clause of the United States Constitution because they treat nonresident plaintiffs less favorably than resident plaintiffs. The trial court held that section 71.052(b) was unconstitutional on its face, whereas section 71.052(c) was unconstitutional only as applied to plaintiffs who commenced their suits between August 1, 1995 and August 31, 1995.[10] Owens Corning challenges the trial court's judgment declaring sections 71.052(b) and (c) unconstitutional and enjoining Owens Corning from seeking to enforce these provisions against the Plaintiffs.

A

Unlike sections 71.051 and 71.031(a)(3), which apply to all claims for personal injury or death, section 71.052's application is limited to asbestos claims. It applies only to claims for personal injury or wrongful death pending on

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[10] All claims filed on or after September 1, 1995 are subject to the same cap on punitive damages found in section 71.052(c). Tex. Civ. Prac. & Rem. Code § 41.008(b); Act of Apr. 11, 1995, 74th Leg., R.S., ch. 19, § 1, sec. 2, 1995 Tex. Gen. Laws 108, 113. Thus, only claims subject to section 71.052 filed between August 1, 1995 and August 31, 1995 are affected by section 71.052(c).

the effective date of the Act (May 29, 1997) in which: (1) the plaintiff was not a Texas resident at the time the claim arose; (2) the plaintiff's claim arose outside Texas; and (3) the plaintiff's claim alleges that harm was caused by exposure to asbestos fibers. Tex. Civ. Prac. & Rem. Code § 71.052(a); Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 2, 4(b), 1997 Tex. Gen. Laws 1680, 1682, 1683. It also provides that "[a] court shall determine that a claim arose in the jurisdiction in which the plaintiff was located at the time the plaintiff is alleged to have been exposed to asbestos." Tex. Civ. Prac. & Rem. Code § 71.052(h).

Section 71.052 has separate provisions dealing with pending asbestos claims, depending on the date the claims were filed. Subsection (b) provides:

> The court, on motion of a defendant, shall dismiss each claim against the defendant that is subject to this section and was filed in this state on or after January 1, 1997, on the filing of a stipulation by the defendant that, for the purposes of limitations, the filing of the claim in another forum would relate back to the date each plaintiff filed his claim in this state.

Id. § 71.052(b). The trial court correctly noted that, although not expressly stated, section 71.052(b) applies only to claims filed on or after January 1, 1997 but before May 29, 1997, the effective date of the Act. Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 4(b), 1997 Tex. Gen. Laws 1680, 1683.

For claims filed before January 1, 1997 but after August 1, 1995, section 71.052(c) states:

> The court, on motion of a defendant, shall dismiss each claim against the defendant that is

> subject to this section and was commenced in this state on or after August 1, 1995, but before January 1, 1997, unless the plaintiff files a written statement electing to:
>
> > (1) abate the plaintiff's claim against the defendant for a period of 180 days from the date the court disposes of the defendant's motion, to afford the plaintiff an opportunity to file a new action on the claims in another state of the United States; or
> >
> > (2) retain the plaintiff's claims against the defendant in this state and limit the plaintiff's recovery on the claims for exemplary damages, if any, against the defendant to an amount not to exceed the greater of:
> >
> > > (A) two times the amount of economic damages plus an amount equal to any noneconomic damages found by the trier of fact, not to exceed $750,000; or
> > >
> > > (B) $200,000.

Id. § 71.052(c).

Before a court may dismiss a claim under either section 71.052(b) or (c), the defendant must file written stipulations that, with respect to the filing of a claim in another state, the defendant agrees: (1) to toll limitations during the time the plaintiff's claim was pending in Texas; and (2) that the plaintiff may elect that the plaintiff and defendant may use discovery already conducted in the case. *Id.* § 71.052(b), (e), & (f).

B

Unlike sections 71.031 and 71.051, the plain language of section 71.052 makes no distinction between residents and nonresidents at the time of filing. The only mention of residence is located in section 71.052(a)(1), which states that section 71.052 applies only if "the plaintiff was not a resident of this state *at the time the claim arose*." Tex. Civ. Prac. & Rem. Code § 71.052(a)(1) (emphasis added). Despite the lack of such a distinction in the statutory language, Plaintiffs cite a number of statements made by the bill's sponsors during floor debates and assert that the Legislature "clearly intended" that section 71.052 should not be applied to any claim filed by a current Texas resident or citizen, and section 71.052 thus discriminates against nonresidents in violation of the Privileges and Immunities Clause. Plaintiffs contend that we are bound to consider the "object sought to be attained" by the Legislature and the legislative history in interpreting the statute, even if the statute is unambiguous on its face. *See* Tex. Gov't Code § 311.023.

When interpreting a statute, we begin with the words of the statute itself, giving words their ordinary meaning. *In re Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371, 380 (Tex. 1998). We should, if possible, interpret the statute in a manner that avoids constitutional infirmities. *Id.*

Despite statements made by the bill's sponsors, the language of section 71.052 is plain: a plaintiff's residence at the time of filing is simply not a consideration under section 71.052. Had the Legislature intended Texas resident plaintiffs to be immune from dismissal, it could have

included such language in section 71.052, as it did in sections 71.051(e)[11] and 71.031(a)(1); or, it could have made section 71.051(e) applicable to section 71.052 instead of limiting its scope specifically to subsection 71.051(b). Because it did not do so, we conclude that section 71.052 does not discriminate on the basis of residence at the time of filing – a Texas resident's claim is subject to dismissal on exactly the same terms as a nonresident's claim. Such a construction applies the plain wording of the statute, avoids potential constitutional infirmities, and is consistent with the Act's title, which states that it relates to "lawsuits arising outside or brought by persons who reside outside of Texas." Act of May 27, 1997, 75th Leg., R.S., ch. 424, 1997 Tex. Gen. Laws 1680, 1680 (emphasis added).

C

Plaintiffs contend that even if section 71.052 discriminates only on the basis of residence at the time the cause of action arose, such discrimination nevertheless violates the Privileges and Immunities Clause. Owens Corning responds that the state may consider the plaintiff's residence at the time the cause of action accrued in deciding whether to entertain a cause of action arising out of state without running afoul of the Privileges and Immunities Clause.

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[11] "The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state." Tex. Civ. Prac. & Rem. Code § 71.051(e).

Owens Corning argues that the Supreme Court's opinion in *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142 (1907), is dispositive and establishes that a statute that does not discriminate on the basis of a plaintiff's citizenship or residence at the time of filing does not implicate the Privileges and Immunities Clause. In *Chambers*, the Supreme Court considered a privileges and immunities challenge to an Ohio statute that allowed an action for wrongful death arising in another state only when the deceased was a citizen of Ohio. *Id.* at 147. In other words, Ohio law discriminated "solely on the citizenship of the deceased" rather than that of the parties. *Id.* at 149. The Court noted that the plaintiff would have been denied hearing of the same cause for the same reason had she been a citizen of Ohio. *Id.* at 151. Thus, Owens Corning contends, because Plaintiffs' claims would have been dismissed even if they were citizens of Texas, the Privileges and Immunities Clause is not implicated.

Plaintiffs respond that *Chambers* does not support Owens Corning's position. In support, Plaintiffs point to the Court's discussion of survival causes of action. *See id.* at 150. The Court stated that because a survival action vests originally with the deceased – in contrast to a wrongful death action, which vests originally with the claimant – the denial of a right to maintain a survival action in Ohio "would be based upon the citizenship of that person in whom the right of action originally vested" and it might be necessary to consider whether such a law would violate the Privileges and Immunities Clause. *Id.* Thus, contend Plaintiffs, the statute in *Chambers* was not constitutional because of the timing of the discrimination,

but because there was no citizenship-based discrimination against the *party* who filed suit. Because section 71.052 discriminates against the party filing suit rather than some other person, Plaintiffs are correct that Chambers leaves the question at hand unresolved. Moreover, *Chambers* is further inapposite because it involved citizenship-based discrimination as opposed to residence-based discrimination.

Thus, we must determine whether section 71.052 impermissibly discriminates on the basis of a plaintiff's prior residence. Plaintiffs contend that Justice O'Connor's concurring opinion in *Zobel v. Williams*, 457 U.S. 55, 71-81 (1982), supports the conclusion that such discrimination violates the Privileges and Immunities Clause. That case involved Alaska's scheme of distributing its surplus oil-boom wealth to residents through dividends paid in proportion to duration of residence. The Court invalidated the scheme on equal protection grounds, and Justice O'Connor wrote separately to state her view that the scheme also violated the Privileges and Immunities Clause because it burdened the freedom to travel. *Id.* at 73-74 (O'Connor, J., concurring). Alaska could have, without violating the Privileges and Immunities Clause, chosen to pay dividends solely to Alaska residents, excluding all nonresidents. The problem arose when Alaska established "degrees of citizenship based on length of residence." *Id.* at 69 (Brennan, J., concurring). Justice Brennan agreed with Justice O'Connor, stating that

> if each State were free to reward its citizens incrementally for their years of residence, so that a citizen leaving one state would thereby

> forfeit his accrued seniority, only to have to begin building such seniority again in his new state of residence, then the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive.

Id. at 68 (Brennan, J., concurring). Plaintiffs contend that section 71.052 similarly burdens the right to travel.

The Supreme Court recently considered the right to travel in *Saenz v. Roe*, 119 S. Ct. 1518 (1999). It recognized that the right to travel embraces at least three components: (1) the right of a citizen of one state to enter and leave another state; (2) the right of a citizen of one state to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the state; and (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of the state. *Id.* at ___. The second component of the right to travel is located in the Privileges and Immunities Clause of Article IV; the third component is located in the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at ___.

In this case, all Plaintiffs are nonresidents of Texas; none has elected to become a Texas resident. Accordingly, only the second component of the right to travel is implicated by their claims. In contrast, *Zobel* involves the third component of the right to travel.[12] The second component of

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[12] With regard to persons who elect to become Texas residents, the third component of the right to travel is implicated because new Texas residents may be denied access to Texas courts for claims that arose during their residence in

the right to travel requires that nonresidents who enter a state temporarily are entitled to enjoy the privileges and immunities enjoyed by citizens of that state, unless there is a substantial reason for discrimination against the nonresidents. *Id.* at ___. Because nonresidents are afforded the same rights and treated the same as residents under section 71.052, the statute does not violate the Privileges and Immunities Clause of Article IV.

D

Plaintiffs also contend that, read in the context of the entire statutory scheme, section 71.052 discriminates on the basis of residence because, even if a Texas resident's claim is dismissed under section 71.052, that Texas resident may simply refile and be exempt from dismissal under sections 71.051 and 71.031(a)(3), whereas a nonresident who refiles will be subject to both sections 71.051 and 71.031(a)(3). Thus, Plaintiffs argue that, "as a practical matter, section 71.052 has no impact on Texas citizens and instead affects only claims brought by citizens of other states." Owens Corning responds that any claim dismissed under section 71.052 could not be refiled in Texas. Owens Corning argues that there is no hint that the Legislature contemplated such refiling, and, in fact, allowing dismissed plaintiffs to refile would run counter to legislative intent because it would provide plaintiffs "a further opportunity to abuse the system and muck up the

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another state. As noted, the right to travel in that case is located in the Fourteenth Amendment. *See Saenz*, 119 S. Ct. at ___. Plaintiffs have not raised this challenge to the statute.

courts." We agree with the Plaintiffs that dismissed claims may be refiled in Texas courts.

Nothing in the statutory language or the legislative history indicates that plaintiffs who are dismissed under section 71.052 may not refile their claims in Texas. Section 71.052 provides that a court may not dismiss a claim until a defendant files certain stipulations regarding limitations and use of previously conducted discovery with respect to a new claim commenced in another state. Although a plaintiff gets the benefit of these stipulations only if he refiles his claim in another state, nothing in the statute prevents a plaintiff from refiling in Texas. This construction is also supported by the legislative history. The House Research Organization's bill analysis states that Senate Bill 220 "would simply apply the law that would be applied to all plaintiffs after enactment of this legislation to those plaintiffs that have commenced actions [on or after January 1, 1997]." House Research Org., Bill Analysis, Tex. S.B. 220, 75th Leg., R.S. (1997). The "law that would be applied to all plaintiffs after enactment of this legislation," including the borrowing statute, could not be applied to the dismissed claims unless they are refiled in Texas courts. Accordingly, we conclude that a plaintiff whose claim is dismissed under section 71.052(b) or (c) may refile his claim in a Texas court, subject to sections 71.051 and 71.031(a)(3).[13]

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[13] Although the statute does not say so, any dismissal under section 71.052 must be without prejudice in order to allow plaintiffs to refile their claims in Texas or another forum. And, for purposes of limitations on refiling in Texas, the statute of limitations is tolled during the period when the claim was pending. *See Flatonia State Bank v. Southwestern Life Ins. Co.*, 127

Allowing plaintiffs dismissed under sections 71.052(b) and (c) to refile in Texas does not violate the Privileges and Immunities Clause. Although nonresidents will be subject to sections 71.051 and 71.031(a)(3) on refiling, while Texas residents will not, we have already held that applying these provisions only to nonresidents does not violate the Privileges and Immunities Clause. And, with regard to plaintiffs who choose the punitive damages cap rather than dismissal under section 71.052(c), both residents and nonresidents are treated alike.

For these reasons, we hold that sections 71.052(b) and 71.052(c) do not violate the Privileges and Immunities Clause of Article IV of the United States Constitution. Plaintiffs assert no challenge to subsection 71.052(c) other than on Privileges and Immunities grounds; however, they make additional challenges to section 71.052(b). We now address those challenges.

E

Plaintiffs contend that section 71.052(b) violates the Equal Protection provisions of the Texas and United States Constitutions. U.S. Const. amend. XIV; Tex. Const. art. I, § 3. Because Texas and United States equal protection analysis is substantially similar, we will not conduct separate analyses. *See Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 264 (Tex. 1994). Generally, if interests other than fundamental rights or suspect classifications

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S.W.2d 188, 192-93 (Tex.), *set aside on other grounds*, 128 S.W.2d 790 (Tex. 1939); *Irwin v. Basham*, 507 S.W.2d 621, 625 (Tex.Civ.App. – Dallas 1974, writ ref'd n.r.e.).

are affected by legislation, the statutory classification must only be rationally related to a legitimate state interest in order to survive an equal protection challenge. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 631 (Tex. 1996). Plaintiffs make no claim that section 71.052's classifications distinguish between classes on a suspect basis, nor do they argue that the legislation affects their fundamental rights. Applying rational basis review, we hold that the Legislature's classification scheme is rationally related to a legitimate state interest.

Early versions of section 71.052 provided for dismissal of a pending asbestos claim if the claim was barred by limitations in the state where the cause of action arose and the claim was not barred by limitations in another forum in which the defendant was subject to personal jurisdiction, unless the claim was already set for trial before January 1, 1998. While the legislation was pending, the Legislature was aware that thousands of out-of-state asbestos claims were being filed in Texas courts. For example, there was evidence that almost 4,900 new claims were filed in Texas from January 1 through April 4, 1997. The Legislature knew from past experience with the 1995 tort reform that many more such filings could be expected before Senate Bill 220 would take effect. In response, the Legislature amended the proposed statute to include the current version of section 71.052, which provides for mandatory dismissal – subject to certain procedural safeguards – and created the date classifications at issue.

We have recognized that it is rational for a new law to become effective immediately so that it is not undermined during the period between its passage and its effective date. *See Barshop*, 925 S.W.2d at 632. It is also well recognized that retroactive application may "prevent circumvention of a new statute in the interval immediately preceding its passage." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267-68 (1994).[14] But here the Legislature went a step further: instead of retroactively applying the new law, it simply dismissed all out-of-state asbestos claims filed within the five-month period preceding the law, without regard to whether the claims would have survived dismissal under the new law. We must determine if that action has a rational basis. In so doing, we must uphold the law if we can conceive of any rational basis for the Legislature's action. *See Sullivan v. Stroop*, 496 U.S. 478, 485 (1990). It does not matter whether the justifications courts may hypothesize as a rational basis in fact underlay the legislative decision. *See Flemming v. Nestor*, 363 U.S. 603, 612 (1960).

Plaintiffs admit that, as a practical matter, dismissal and refiling effectuates a retroactive application of sections 71.051 and 71.031(a)(3). Plaintiffs argue that the only members of the class that are ultimately blocked by the mandatory dismissal provision are Alabama citizens whose claims will not survive application of the new borrowing statute. Plaintiffs suggest that many plaintiffs dismissed under section 71.052(b) will simply refile their

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[14] In fact, that is the result of applying section 71.052(c) – it retroactively applies the punitive damages cap to claims filed in the month preceding its passage.

cases in Texas. Although some of these plaintiffs will not survive application of section 71.051, plaintiffs contend that many will, and, although they will have "unnecessarily and irrationally suffered from the classification by having to pay an additional filing fee and by losing their original place in the trial queue, their cases will remain in Texas." In contrast, certain Alabama plaintiffs such as Moore cannot refile because their refiled claims will be barred by the borrowing statute. Thus, plaintiffs contend that, "as a practical matter, the only purpose furthered by . . . the mandatory dismissal of pending claims is the illegitimate goal of retroactively shortening the statute of limitations applicable to Alabama citizens who filed between January 1 and May 29, 1997." Plaintiffs contend that such a purpose cannot satisfy the rational basis test because the goal – application of the borrowing statute to bar pending claims – is itself unconstitutional.

As we have already held, applying the borrowing statute to bar pending claims is not unconstitutionally retroactive. Thus, the question to be decided is whether there is a rational basis for the Legislature to require mandatory dismissal of claims in order to effect a retroactive application of the borrowing statute, rather than simply providing that it (and section 71.051) be applied retroactively. We note that, although the trial court made certain findings[15] that disagreed with the Legislature's fact findings,

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[15] For example, the trial court held that there was no evidence that the out-of-state asbestos claims were preventing Texas plaintiffs from reaching their day in court, and noted that the Texas Judicial Council's Annual Report for Fiscal Year 1996 indicated that Texas courts were, on the whole, keeping up with their backlog notwithstanding the out-of-state asbestos claims.

these findings play a limited role in rational basis review. *Texas Workers' Compensation Comm'n v. Garcia*, 893 S.W.2d 504, 520 (Tex. 1995) (" 'If under any possible state of facts an act would be constitutional, the courts are bound to presume such facts exist; and therefore the courts will not make a separate investigation of the facts, or attempt to decide whether the legislature has reached a correct conclusion with respect to them.' ") (quoting *Corsicana Cotton Mills v. Sheppard*, 71 S.W.2d 247, 250 (Tex. 1934)).

Plaintiffs argue that there is no rational basis for treating similarly situated plaintiffs differently based on the time of filing suit. *See Binney v. Long*, 299 U.S. 280, 292 (1936) (classifications of similarly situated remaindermen for tax purposes based solely on time of conveyance held to violate the Equal Protection Clause). Plaintiffs contend that, with regard to nonresident plaintiffs, the Legislature cannot rationally justify treating pending claims filed between January 1, 1997 and May 29, 1997, which will be retroactively dismissed under 71.052(b) on defendant's motion, more harshly than claims filed on or after May 29, 1997, which will be dismissed only if the defendant satisfies its burden of proving the forum non conveniens factors under section 71.051, including the existence of an alternative forum. In addition, Plaintiffs contend that the classifications violate equal protection principles with regard to Texas residents: A Texas resident who files suit on May 28, 1997 and whose claims are pending on May 29, 1997 is subject to mandatory dismissal under section 71.052(b), whereas a Texas resident who files suit on May 29, 1997 is immune from dismissal under section 71.051.

Plaintiffs contend this disparity in treatment cannot rationally be justified. To the contrary, we conclude that requiring dismissal of claims filed between January 1, 1997 and May 29, 1997, rather than applying the new law to those claims, is rationally related to a legitimate state interest.

The Legislature reasonably believed that Texas's resources were better spent on cases having a more substantial relation to Texas, and that Texas residents were being denied access to their own courts because of a backlog of cases the Legislature reasonably believed should be litigated elsewhere. The purpose of Senate Bill 220 was to remove the asbestos exception from section 71.051 and to discourage forum shopping by all out-of-state plaintiffs with claims arising in another state by adopting the borrowing statute. Certainly, these are legitimate state interests.

To further these goals, the dismissal provisions in section 71.052 attempt to relieve the burden that asbestos claims have placed on Texas courts, while attempting to treat pending claims fairly:

> [Senate Bill 220] would not affect any asbestos-related cases commenced in Texas by out-of-state plaintiffs before August 1, 1995. Any cases commenced before that date would likely be far enough along in the course of the case that they should be making their way out of Texas courts very soon.
>
> Claims of asbestos-related plaintiffs who have filed suit from August 1, 1995, to January 1, 1997, the bulk of pending asbestos-related [litigation], would be allowed to remain in Texas

> courts only if they agreed to have punitive damages . . . limited. . . . Such a limitation would be an incentive for these plaintiffs to seek out another forum in which to try their cases. While it would encourage plaintiffs to seek out other forums, if such forums were not available, the plaintiffs could still use Texas courts to pursue their claims. . . . [And] [s]uch a limitation could likely encourage settlement of asbestos-related claims . . . because it would establish limits on how high punitive damages could go. . . .
>
> The only asbestos-related plaintiffs whose cases would likely be barred from being brought in Texas courts are those that have been commenced this year, after plaintiff's attorney's [sic] were placed on notice that the Legislature was considering limiting such suits. That notice encouraged a significant amount of cases to be filed in the hopes of "getting in under the wire" and ensuring the out-of-state plaintiff had a place in line in Texas courts. [Senate Bill 220] would simply apply the law that would be applied to all plaintiffs after enactment of this legislation to those plaintiffs that have commenced actions [after January 1, 1997]. Unless a claim would have been proper in the plaintiff's own jurisdiction, Texas courts would not be burdened [with] such claims simply because Texas calculates its statutes of limitations differently.

House Research Org., Bill Analysis, Tex. S.B. 220, 75th Leg., R.S. (1997). Thus, the Legislature had a rational basis for choosing the dates that it did.

In addition, there is a rational basis for providing for dismissal of all claims filed between January 1, 1997 and

May 29, 1997. If the Legislature had provided that sections 71.031(a)(3) and 71.051 applied retroactively to these claims, significant Texas court resources would still have to be expended in determining which claims must be dismissed under those provisions. The goals of the Act would be undermined because significant court resources would have to be expended on claims that the Legislature reasonably believed should be litigated elsewhere, causing claims that the Legislature determined were properly in Texas to be further delayed. By providing for mandatory dismissal instead, these claims could be removed from Texas courts with a minimal expenditure of resources – the court need only determine if the requisite stipulations have been filed. Claims that would not have survived a retroactive application of section 71.031(a)(3) are dismissed at minimal cost, and will not be refiled. Nonresident plaintiffs' claims that would survive section 71.031(a)(3) can be refiled in Texas if the plaintiff chooses. However, requiring the defendant to file written stipulations agreeing to toll limitations and allowing plaintiffs to use any discovery already conducted if the claim is refiled in another jurisdiction provide additional incentives for plaintiffs to refile in another forum. Although some nonresident plaintiffs and Texas residents who refile in Texas will have lost their filing fees, previous discovery, and their places in line, the Legislature's chosen classifications need not be made with mathematical exactitude, and any overinclusiveness is not so great as to render the classifications irrational or arbitrary. Accordingly, we hold that section 71.052(b) does not violate the Equal Protection Clauses of the Texas or United States Constitutions.

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Plaintiffs also contend that the Act is a special law in violation of Article III, Section 56 of the Texas Constitution. A special law is limited to a particular class of persons distinguished by some characteristic other than geography. *Texas Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 465 (Tex. 1997). Legislation does not violate Article III, Section 56 as long as there is a reasonable basis for its classifications. *Id.* For the reasons explained above, the Act satisfies this requirement. *See id.; Maple Run at Austin Mun. Util. Dist. v. Monaghan*, 931 S.W.2d 941, 945 (Tex. 1996).

* * *

In sum, we affirm the trial court's judgment that section 71.051 does not violate the Privileges and Immunities Clause. Because we hold that sections 71.031(a)(3), 71.052(b), and 71.052(c) are constitutional with respect to the challenges asserted by Plaintiffs, we reverse the trial court's judgment to the contrary, and instruct the court to vacate its orders enjoining Defendants from attempting to enforce those provisions.

GREG ABBOTT
JUSTICE

OPINION DELIVERED: July 1, 1999

APPENDIX B

No. 95-11157

LARRY R. CHANDLER, ET AL.	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	

ORDER GRANTING INJUNCTIVE RELIEF

This Court has this day issued an Interlocutory Declaratory Judgment declaring that TEX. CIV. PRAC. & REM. CODE § 71.052(c) violates the Privileges and Immunities Clause of the United States Constitution. The Defendants in this case have indicated their intention to seek to have the statute applied in order to have Plaintiffs' claim dismissed unless Plaintiffs agree to accept the statutory cap on punitive damages. The Court finds that Plaintiffs would suffer irreparable injury from having to defend against the application of statutory provisions the court has found to be unconstitutional. Pursuant to TEX. CIV. P. 683, the Court hereby

ENJOINS all Defendants in this case from seeking to enforce the provisions of TEX. CIV. PRAC. & REM. CODE § 71.052(c) against Plaintiffs in this case; provided, however that Defendants are not enjoined from filing any pleadings in the court or in any appellate court for the purposes of seeking appellate review of this Court's ruling that this statute is unconstitutional.

SIGNED this 21st day of November, 1997.

/s/
HON. JOHN K. DIETZ
JUDGE, 250TH Judicial District,
Travis County

No. 95-10513A

HILLIARD CARTER	§	IN THE DISTRICT
V.	§	COURT OF TRAVIS
	§	COUNTY, TEXAS 250TH
OWENS CORNING,	§	JUDICIAL DISTRICT
ET AL.	§	

ORDER GRANTING INJUNCTIVE RELIEF

This Court has this day issued an Interlocutory Declaratory Judgment declaring that TEX. CIV. PRAC. & REM. CODE § 71.052(c) violates the Privileges and Immunities Clause of the United States Constitution. The Defendants in this case have indicated their intention to seek to have the statute applied in order to have Plaintiffs' claim dismissed unless Plaintiffs agree to accept the statutory cap on punitive damages. The Court finds that Plaintiffs would suffer irreparable injury from having to defend against the application of statutory provisions the court has found to be unconstitutional. Pursuant to TEX. CIV. P. 683, the Court hereby

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SIGNED this 21st day of November, 1997.

/s/
HON. JOHN K. DIETZ
JUDGE, 250TH Judicial District,
Travis County

No. 95-10513

JAMES B. CARROLL, ET AL.	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	

ORDER GRANTING INJUNCTIVE RELIEF

This Court has this day issued an Interlocutory Declaratory Judgment declaring that TEX. CIV. PRAC. & REM. CODE § 71.052(c) violates the Privileges and Immunities Clause of the United States Constitution. The Defendants in this case have indicated their intention to seek to have the statute applied in order to have Plaintiffs' claim dismissed unless Plaintiffs agree to accept the statutory cap on punitive damages. The Court finds that Plaintiffs would suffer irreparable injury from having to defend against the application of statutory provisions the court has found to be unconstitutional. Pursuant to TEX. CIV. P. 683, the Court hereby

ENJOINS all Defendants in this case from seeking to enforce the provisions of TEX. CIV. PRAC. & REM. CODE § 71.052(c) against Plaintiffs in this case; provided, however that Defendants are not enjoined from filing any pleadings in the court or in any appellate court for the purposes of seeking appellate review of this Court's ruling that this statute is unconstitutional.

SIGNED this 21st day of November, 1997.

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No. 95-11157

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V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	
	§	

No. 95-10495

GEORGE R. ADAY, ET AL.	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	

INTERLOCUTORY DECLARATORY JUDGMENT

Defendants' counterclaims for declaratory relief in the above-referenced causes concerning the constitutionality of TEX. CIV. PRAC. & REM. CODE § 71.052(c) were presented to this Court in a bench trial held on November 4, 1997. The trial of these counterclaims was held jointly with the trial of declaratory judgment issues raised in Cause No. 97-05359, *Deford, et al. v. Owens-Corning Fiberglas Corporation, et al., pursuant to T.R.C.P. rule 174(a).*

The parties appeared in open court on November 4 and presented evidence and argument to the Court. After considering the evidence and the argument of counsel, the Court issues the following rulings:

1) TEX. CIV. PRAC. & REM. CODE § 71.052(c) violates the Privileges and Immunities Clause, Art. IV, § 2, of the United States Constitution for the following reasons:

> a) The Privileges and Immunities Clause requires a state to accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens. *McKnett v. St. Louis & San Francisco R.Co.*, 292 U.S. 230 (1934), quoted in *Howlett v. Rose*, 496 U.S. 354, 381 n. 26 (1990); *Corfield v. Coryell*, 4 Wash. C.C. 371, 381, Federal Case No. 3,230

(1825); *compare Canadian Northern Ry.Co. v. Eggen*, 252 U.S. 553, 562 (1920). For purposes of analysis under the Privileges and Immunities Clause, "citizen" and "resident" are interchangeable. *Hicklin v. Orbeck*, 437 U.S. 518, 523 n. 8 (1978); *United Bldg. & Const. v. Mayor & Council of Camden*, 465 U.S. 208, 216 (1984). If nonresidents are not afforded substantially the same right of access to the courts, there must be a substantial reason for the discrimination, and the discrimination the statute works against nonresidents must "bear a substantial relationship to the 'evil' they are said to present" *Hicklin*, 437 U.S. at 529.

b) Section 71.052 (c) requires dismissal of non-resident asbestos claims filed between August 1, 1995 and December 31, 1996, unless the plaintiffs submit to a cap on exemplary damages. Under this provision, non-resident asbestos plaintiffs do not have substantially the same right of access to Texas courts enjoyed by Texas residents.

c) Non-resident and resident asbestos plaintiffs who filed on or after September 1, 1995, are equally subject to the statutory cap found in Tex. Civ. Prac. & Rem. Code § 41.008. However, under § 71.052(c) only non-resident asbestos plaintiffs who filed between August 1, 1995 and August 31, 1995 are subject to a cap, while resident asbestos defendants are not.

d) Non-resident asbestos plaintiffs are not given substantially the same access to courts as resident asbestos plaintiffs under § 71.052. § 71.052 does not apply equally to all asbestos claims arising out of the state. Rather, it only applies to asbestos claims arising out of the state

in which the plaintiff *was a resident of another state at the time the claim arose.* By subsection (a)(1), the Legislature revealed its clear intent to target only nonresident asbestos plaintiffs. The entire Legislative Record reveals the Legislature's clear and unrefutable intent to discriminate against plaintiffs who were residents of other states *at the time they filed suit.*

e) There is no evidence of any substantial reason for the discrimination between non-residents and residents in Section 71.052(c). Imposing a cap on exemplary damages on non-resident asbestos plaintiffs is not substantially related to relieving docket congestion. There is no evidence that these out-of-state claims are preventing Texas plaintiffs from reaching their day in court. Further THE TEXAS JUDICIAL COUNCIL ANNUAL REPORT FOR FISCAL YEAR 1996, which the Court took notice of, indicates that Texas Courts are keeping up with their backlog, notwithstanding these asbestos claims.

f) There are less restrictive means for managing these cases, some of which are already in place in many jurisdictions.

g) For the reasons given above, § 71.052(c) is unconstitutional as applied to plaintiffs who commenced their suits between August 1, 1995 and August 31, 1995.

SIGNED this 21st day of November, 1997.

/s/
HON. JOHN K. DIETZ
JUDGE, 250TH Judicial District,
Travis County

No. 95-11157

LARRY R. CHANDLER, ET AL.	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	

No. 95-10513

JAMES B. CARROLL, ET AL.	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	

No. 95-10513A

HILLIARD CARTER	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
OWENS CORNING, ET AL.	§	JUDICIAL DISTRICT
	§	
	§	

No. 95-10495

GEORGE R. ADAY, ET AL.	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	

INTERLOCUTORY ORDER

On the 4th day of November, 1997, the court considered Defendant/Counter-Plaintiff Owens-Corning request for Class Certification in their counterclaims brought in the above-referenced cause.

After hearing the arguments of counsel, and considering the evidence submitted to the court, the court DENIES Defendant/Counter-Plaintiffs' request.

SIGNED this 21st day of November, 1997.

/s/
HON. JOHN K. DIETZ
JUDGE, 250TH Judicial District,
Travis County

No. 95-10495

GEORGE R. ADAY, ET AL.	§	IN THE DISTRICT
	§	COURT OF TRAVIS
V.	§	COUNTY, TEXAS 250TH
	§	JUDICIAL DISTRICT
OWENS CORNING, ET AL.	§	
	§	

ORDER GRANTING INJUNCTIVE RELIEF

This Court has this day issued an Interlocutory Declaratory Judgment declaring that TEX. CIV. PRAC. & REM. CODE § 71.052(c) violates the Privileges and Immunities Clause of the United States Constitution. The Defendants in this case have indicated their intention to seek to have the statute applied in order to have Plaintiffs' claim dismissed unless Plaintiffs agree to accept the statutory cap on punitive damages. The Court finds that Plaintiffs would suffer irreparable injury from having to defend against the application of statutory provisions the court has found to be unconstitutional. Pursuant to TEX. CIV. P. 683, the Court hereby

ENJOINS all Defendants in this case from seeking to enforce the provisions of against Plaintiffs in this case; provided, however that Defendants are not enjoined from filing any pleadings in the court or in any appellate court for the purposes of seeking appellate review of this Court's ruling that this statute is unconstitutional.

SIGNED this 21st day of November, 1997.

/s/
HON. JOHN K. DIETZ
JUDGE, 250TH Judicial District,
Travis County

No. 95-05359

AUSTIN E. DEFORD; WINFRED ALLEN; CLYDE R. BRYSON; WILLIAM R. BOWERS; WAYNE ALVIN CURTIS; WILLIAM HOYT EARLEY, SR.; MELVIN LEE HORTON; STANLEY MARTIN and RUBY BELLE MARTIN; RAYMOND LEE MOORE; JOE HARRISON TODD; and LILLARD MILBURN WHITE; Individually, and RAYMOND LEE MOORE and MELVIN LEE HORTON, on their own behalf and on behalf of others similarly situated	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 250TH JUDICIAL DISTRICT
Plaintiffs,	§	
V.	§	
OWENS-CORNING FIBERGLAS CORPORATION; ET AL.	§	

INTERLOCUTORY ORDER

On the 4th day of November, 1997, the court considered Plaintiffs' Request for Class Certification in Cause No. 97-05359. After hearing the arguments of counsel, and considering the evidence submitted to the court, the Court DENIES Plaintiffs request.

SIGNED this 21st day of November, 1997.

/s/
HON. JOHN K. DIETZ
JUDGE, 250TH Judicial District,
Travis County

APPENDIX C

1) PRIVILEGES AND IMMUNITIES CLAUSE, U.S. CONST., art. IV, sec. 2, The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

2) EQUAL PROTECTION CLAUSE U.S. CONST., amend. XIV, No State shall * * * deny to any person within its jurisdiction the equal protection of the laws.

3) Ch. 424 75th LEGISLATURE - REGULAR SESSION

CHAPTER 424

S.B. No. 220

AN ACT

relating to lawsuits arising outside or brought by persons who reside outside of Texas.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 71.051, Civil Practice and Remedies Code, is amended to read as follows:

Sec. 71.051. FORUM NON CONVENIENS. (a) With respect to a plaintiff who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice a claim or action to which this section applies would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the claim or action in whole or in part on any conditions that may be just.

(b) With respect to a plaintiff who is a legal resident of the United States, on written motion of a party, a claim or action to which this section applies may be stayed or dismissed in whole or in part under the doctrine of forum non conveniens if the party seeking to stay or dismiss the claim or action proves by a preponderance of the evidence that:

(1) an alternative forum exists in which the claim or action may be tried;

(2) the alternate forum provides an adequate remedy;

(3) maintenance of the claim or action in the courts of this state would work a substantial injustice to the moving party;

(4) the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

(5) the balance of the private interests of the parties and the public interest of the state predominate in favor of the claim or action being brought in an alternate forum; and

(6) the stay or dismissal would not result in unreasonable duplication or proliferation of litigation.

(c) The court may set terms and conditions for staying or dismissing a claim or action under this section as the interests of justice may require, giving due regard to the rights of the parties to the claim or action. If a moving party violates a term or condition of a stay or dismissal, the court shall withdraw the order staying or dismissing

the claim or action and proceed as if the order had never been issued. Notwithstanding any other law, the court shall have continuing jurisdiction for purposes of this subsection:

A request for stay or dismissal under this section is timely if it is filed not later than 180 days after the time required for filing a motion to transfer venue of the claim or action. The court may rule on a motion filed under this section only after a hearing with notice to all parties not less than 21 days before the date specified for the hearing. The court shall afford all of the parties ample opportunity to obtain discovery of information relevant to the motion prior to a hearing on a motion under this section. The moving party shall have the responsibility to request and obtain a hearing on such motion at a reasonable time prior to commencement of the trial, and in no case shall the hearing be held less than 30 days prior to trial.

(e) The court may not stay or dismiss a plaintiff's claim under Subsection (b) if the plaintiff is a legal resident of this state. If an action involves both plaintiffs who are legal residents of this state and plaintiffs who are not, the court may not stay or dismiss the action under Subsection (b) if the plaintiffs who are legal residents of this state are properly joined in the action and the action arose out of a single occurrence. The court shall dismiss a claim under Subsection (b) if the court finds by a preponderance of the evidence that a party was joined solely for the purpose of obtaining or maintaining jurisdiction in this state and the party's claim would be more properly heard in a forum outside this state.

(f) A court may not stay or dismiss a claim or action pursuant to Subsection (b)

if a party opposing the motion under Subsection (b) alleges and makes a prima facie showing that an act or omission that was a proximate or producing cause of the injury or death occurred in this state. The prima facie showing need not be made by a preponderance of the evidence and shall be deemed to be satisfied if the party produces credible evidence in support of the pleading, which evidence need not be in admissible form and may include affidavits, deposition testimony, discovery responses, or other verified evidence

(g) Any time limit established by this section may be extended by the court at the request of any party for good cause shown.

(h) In this section:

(1) "Legal resident" means an individual who intends the specified political subdivision to be his permanent residence and who intends to return to the specified political subdivision despite temporary residence elsewhere or despite temporary absences, without regard to the individual's country of citizenship or national origin. The term does not include an individual who adopts a residence in the specified political subdivision in bad faith for purposes of avoiding the application of this section.

(2) "Plaintiff" means a party seeking recovery of damages for personal injury or wrongful death. In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, "plaintiff" includes both that other person

and the party seeking such recovery. The term does not include a counter claimant, cross-claimant, or third-party plaintiff or a person who is assigned a cause of action for personal injury, or who accepts an appointment as a personal representative in a wrongful death action, in bad faith for purposes of affecting in any way the application of this section.

(i) This section applies to actions for personal injury or wrongful death. This section shall govern the courts of this state in determining issues under the doctrine of forum non conveniens in the actions to which it applies, notwithstanding Section 71.031(a) or any other law.

SECTION 2. Subchapter D, Chapter 71, Civil Practice and Remedies Code, is amended by adding Section 71.052 to read as follows:

Sec. 71.052. JURISDICTION; ELECTION; STIPULATIONS. (a) This section applies only to a claim for personal injury or wrongful death in which:

(1) the plaintiff was not a resident of this state at the time the claim arose;

(2) the plaintiff's claim arose outside this state; and

(3) the plaintiff's claim alleges that harm was caused by exposure to asbestos fibers.

(b) The court, on motion of a defendant, shall dismiss each claim against the defendant that is subject to this section and was filed in this state on or after January 1, 1997, on the filing of a stipulation by the defendant that, for the purposes of limitations, the filing of the claim

in another forum would relate back to the date each plaintiff filed his claim in this state.

(c) The court, on motion of a defendant, shall dismiss each claim against the defendant that is subject to this section and was commenced in this state on or after August 1, 1995, but before January 1, 1997, unless the plaintiff files a written statement electing to:

> (1) abate the plaintiff's claim against the defendant for a period of 180 days from the date the court disposes of the defendant's motion, to afford the plaintiff an opportunity to file a new action on the claims in another state of the United States; or
>
> (2) retain the plaintiff's claims against the defendant in this state and limit the plaintiff's recovery on the claims for exemplary damages, if any, against the defendant to an amount not to exceed the greater of:
>
> > (A) two times the amount of economic damages plus an amount equal to any non-economic damages found by the trier of fact, not to exceed $750,000; or
> >
> > (B) $200,000.

(d) If a plaintiff files a written statement making an election under Subsection (c), the court shall deny the defendant's motion filed under Subsection (c) and shall enter an order in accordance with the plaintiff's election. If the plaintiff makes an election under Subsection (c), the election is effective as to all defendants and the court may not require the plaintiff to refile the election against any subsequent motion filed by a defendant under Subsection (c). If a plaintiff elects to abate the claim, the court shall

dismiss each of the plaintiff's claims against the defendants at the end of the abatement period.

(e) A court may not abate or dismiss a claim under Subsection (c) against a defendant until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, the defendant waives the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed or the period of abatement ends.

(f) The court may not abate or dismiss a claim under this section against a defendant until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff in another state of the United States, the plaintiff may elect that the plaintiff and the defendant may:

(1) rely on responses to discovery already provided under the Texas Rules of Civil Procedure, plus any additional discovery that may be conducted under the rules of civil procedure in the other state; or

(2) use responses to discovery already provided and conduct additional discovery as permitted under the rules of civil procedure in the other state.

(g) To comply with this section in relation to an action that involves both claims that arose in this state

and claims that arouse outside this state, a court shall consider each claim individually and shall sever from the action the claims that are subject to this section.

(h) A court shall determine that a claim arose in the jurisdiction in which the plaintiff was located at the time the plaintiff is alleged to have been exposed to asbestos fibers. If a plaintiff alleges that the plaintiff was exposed to asbestos fibers while located in more than one jurisdiction, the court shall determine, for purposes of this section, which of the jurisdictions is the most appropriate forum for the claim, considering the relative amounts and lengths of the plaintiff's exposure to asbestos fibers in each of the jurisdictions.

SECTION 3. Subsections (a) and (b), Section 71.031, Civil Practice and Remedies Code, are amended to read as follows:

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives the right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action;

(3) for a resident of a foreign state or country, the action is begun in this state within the time provided by the laws of the foreign state or

country in which the wrongful act, neglect, or default took place; and

(4) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) Except as provided by Subsection (a), all matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

SECTION 4. (a) Section 1 of this Act applies to:

(1) a civil action commenced on or after January 1, 1999, that is:

(A) an action against a railroad company brought under the federal Employers' Liability Act (45 U.S.C. Section 51 et seq.), the federal Safety Appliance Act (45 U.S.C. Section 1 et seq.), or the federal Boiler Inspection Act (45 U.S.C. Section 22 et seq.); or

(B) an action in which it is alleged that the personal injury or death was caused by a means of air transportation operated in this state or occurred while traveling in or on a means of air transportation during a trip originating from or destined for a location in this state; and

(2) a civil action commenced on or after the effective date of this Act, other than an action described in Subdivision (1) of this section.

(b) Section 2 of this Act applies to a civil action that is pending on the effective date of this Act in which the plaintiff alleges that harm was caused by exposure to

asbestos fibers. In an action commenced before the effective date of this Act, a trial of a plaintiff's action that was completed before that date, or that is in progress on that date, and a subsequent new trial or retrial of that plaintiff's action are governed with respect to the subject matter of Section 2 of this Act by the applicable law in effect immediately before that date, and that law is continued in effect for that purpose.

(c) Section 3 of this Act applies to a civil action commenced on or after the effective date of this Act. A civil action commenced before the effective date of this Act is governed by the applicable law in effect immediately before that date as to all parties joined in that action before that date and as to other defendants properly joined after the effective date who could not have been joined in the action before the effective date because of the existence of an injunction prohibiting such joinder, and that law is continued in effect for that purpose.

SECTION 5. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the Senate on March 18, 1997: Yeas 27, Nays 4;

the Senate concurred in House amendments on May 27, 1997: Yeas 28, Nays 3; passed the House, with

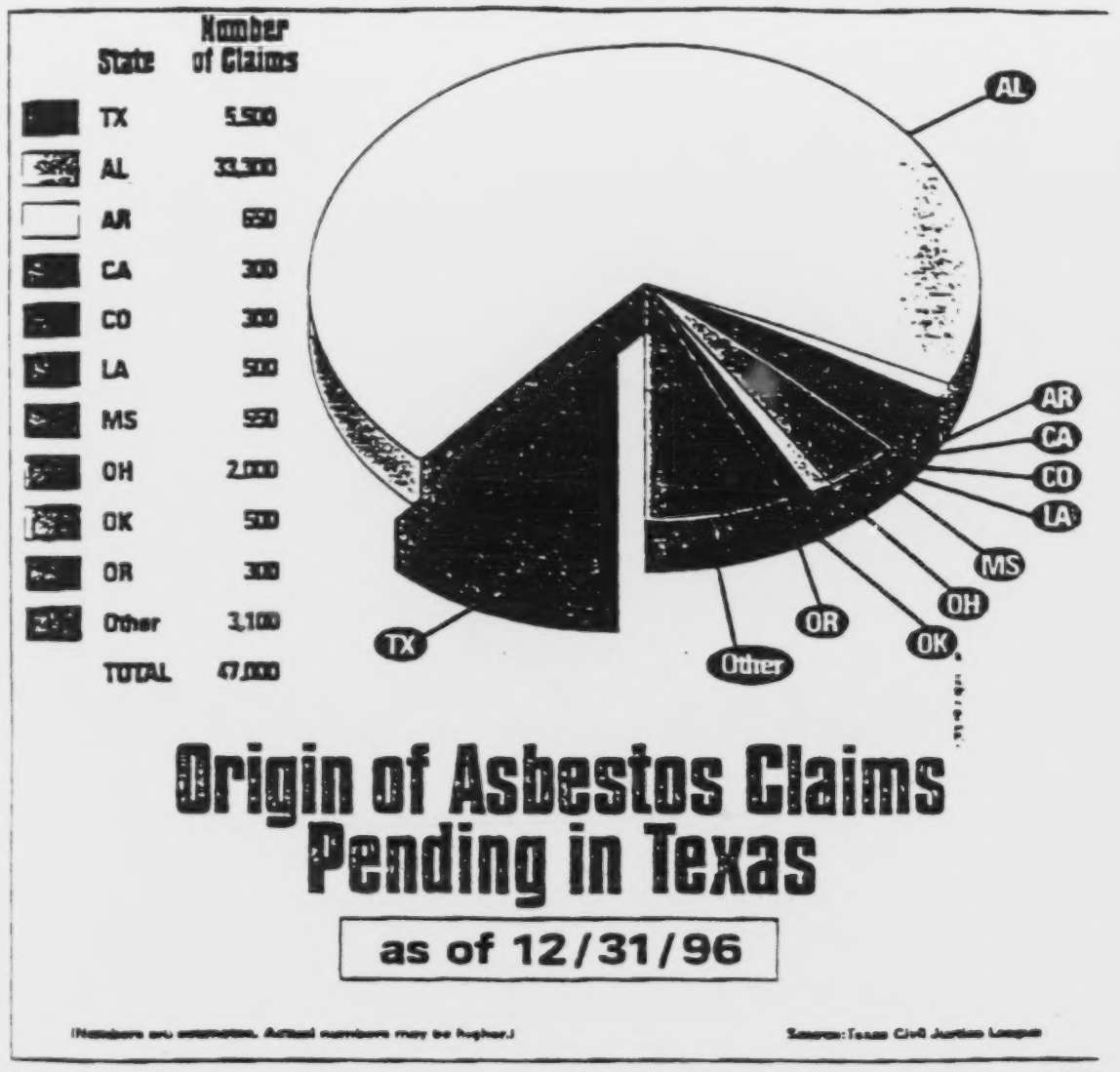
amendments, on May 24, 1997: Yeas 128, Nays 5, three present not voting.

Approved May 29, 1997.

Effective May 29, 1997.

4) ARTICLE I, SECTION 16 OF THE TEXAS CONSTITUTION, All courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law.

APPENDIX D



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APPENDIX E

Tr. 113

Mr. Junell: The merits of those claims had no connection with Texas, but our courts would have to accept those claims, process those claims, and ultimately try those claims. Senate Bill 220 would amend the Alfaro statute to make it easier for Texas courts to remove cases from our dockets if the merits of the case have no connection to Texas.

In some instances the bill in a very, very limited few cases would require the courts to move certain cases off the docket immediately. This bill would revise the forum non conveniens statute to more closely parallel the common law doctrine, but it preserves certain procedural aspects.

Section 1 of the bill would repeal the loopholes for railroad FELA claims, aviations claims, asbestos claims, and claims alleging a violation of Texas or federal law. It does provide – and I think this is important for Texas residents. It provides an exception for claims by Texas residents. If the action involves Texas residents and nonresidents, the court may not stay or dismiss a claim if a Texas resident is properly joined as a plaintiff in the action and the claim or action arose out of a common occurrence. These are claims such as airplane accidents.

A number of other things that Section 2 of the bill would do, it involves special procedures for asbestos claims that have been filed by nonresidents. And I want to say this again. These are claims that were filed by nonresidents of the state of Texas that arose outside of the state of Texas. Claims filed before August the 1st, 1995,

would remain in Texas. And I think the chart shows that's approximately – Kyle, help me, I can't see my charts from here – 45 – 45 percent of those cases.

Tr. 116

Mr. Junell: Section 3 involves the borrowing statute, and the borrowing statute is where you borrow the procedural aspects of another state. And I'll give you an example. A good number of these cases that came in in 1995 came from the state of Alabama. The statute of limitations had already run in the state of Alabama on these cases. They were barred from being brought in Alabama.

APPENDIX F

Tr. 45

Mr. Peeples: Thank you, Madam Chairman. I'm David Peeples. I'm a district judge in San Antonio. I've tried one of these cases and had others come to my court and have some personal experience in that regard, and I also have looked jurors in the eye and empathized with them when they give me the excuses that they can't take the time to be on jury duty.

Tr. 54

Ms. Ashby: Now, as to how much time I actually spend on asbestos, let's look at it from two perspectives. As the asbestos judge, I have set in re hearings usually one Friday afternoon a month, sometimes every other month. So that's approximately a half an hour – I mean a half a day, three hours a month, sometimes every other month, to conduct business concerning in re hearings. It's enough. It's not a whole bunch of my time.

Now, with respect to my asbestos docket, which I usually have at the end of July, I will carry – and I'm not sure at this point in time because I have pretrial motions pending, but I've heard everything from one asbestos case to setting over 200 asbestos cases on the docket with plans to have four visiting judges lined up to actually hear the cases if they went to trial. I believe there was only one or two cases out of the 200-plus docket that ended up going on to trial, a jury was picked for two days, and then the cases settled.

So in the eight years, seven and a half years that I've been on a district bench, I have heard two asbestos cases to verdict, and they took anywhere from eight – eight or nine days, I believe with the one plaintiff, to about three weeks with – and I don't recall the exact number, but there were 15, 16 plaintiffs or something like that. The rest of my dockets have been handled by usually picking a jury which takes anywhere from one to two days, and then the rest of the cases settle.

Tr. 57

Ms. Ashby: My request to you is that you leave the docketing statement system as it is with respect to retroactivity. It's manageable, it can be handled, and it works.

Tr. 59

Mr. Link: I have – I do have the numbers in Harris County on how much the out-of-pocket asbestos cases have cost citizens of Harris County. It's this number right here. Zero. The filing fees for the 7,441 cases in Harris County is 41.3 million to the State of Texas and to the citizens of Harris County.

If I can, let me draw an analogy to the way Harris County handles asbestos cases and another system that was perfected I think to a large degree in Harris County, and that's the medical center. How, I don't know where Mr. Beatty, who was kind enough to come here today and testify – I don't know where he had his surgery, but I know if he had an option, he would come to Harris County and have his surgery at one of the fine medical

hospitals we have in the medical center. Probably the best medical center in the world.

And when they come to the medical center for treatment, those doctors don't ask where are you from, where did you work, who's your parents, what you doing, anything else. They treat those people the best they can and they release them.

And that's what's happening in Harris County. Those people come to us, and we're not outcome determinative, we're not outcome oriented. If they win, they win. If they lose, they lose. But they get their day in court and they get it fast. And we don't ask where are you from, who are you, what gender are you, what race are you. We don't care. We get them to trial and try their cases. And once again, nobody has ever come and said, Judge Link, I had this auto accident case, and if you wouldn't have been trying asbestos cases, I could have got my auto accident case to trial.

Now, I'm here to entertain any questions that you may have regarding the asbestos docket, but it doesn't take additional time. There have not been any clerks hired, additional clerks hired, to handle asbestos cases in Harris County. I handle the master asbestos cases with my clerks who are already there handling other cases, and if I wish to apply an extra 10 to 20 percent of my time, that's my prerogative and I do so and I just stay that much longer.

And it's not – and I respect Judge Peeples, who I've met before and is a very good judge, but I think it is – his system could possibly – the way they try cases in San

Antonio could be improved, the way that we've done it in Harris County, the way they've done it in Dallas County.

So far as clogging the dockets, absolutely not. It's not true in Harris County. And if it were so, I think there would be people down here to testify from Harris County about the difficulty and the problems it's created down there, but there is not, and I doubt you'll see anybody, certainly not any judgment from Harris County.

APPENDIX G

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE
75th Regular Season

February 4, 1997

To: Honorable David Sibley, Chair
Committee on Economic
Austin, Texas

IN RE: SENATE BILL No. 220
By: Bivins

From: John Keel, Director

In response to your request for a Fiscal Note on SB220 (Relating to lawsuits arising outside or brought by persons who reside outside of Texas.) this office has determined the following:

Biennial Net Impact to General Revenue Funds by SB220-As Introduced

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No significant fiscal implication to the State is anticipated.

No significant fiscal implication to units of local government is anticipated.

Source: Agencies:
LBB Staff: JK, TH, PE

APPENDIX H

Tr. 37

THE COURT: There's one other item in particular that I want to take note of, and that is in the 1996 fiscal year in the state of Texas, the district courts were able to dispose of 470,210 cases.

Any other objection, or any comment?

MR. BARON: Your Honor, I'm Fred Baron. I would note also in that report, there is a time-to-disposition chart.

THE COURT: Yes, sir.

MR. BARON: And I would ask the Court to take notice of that, as well.

THE COURT: And basically, for fiscal year 1996, what that shows is that out of the 470,210 dispositions, there were 123,052 cases disposed of that had an age of three months or less.

In the three months to six months range, 90,036 cases were disposed. Cases that were on file for six months to twelve months, 89,746 cases were disposed, and cases that were twelve to eighteen months old, 55,084 cases were disposed, and when cases were over eighteen months old, 112,292, were disposed for a total of 470,210.

Tr. 40

MR. GARRARD: We stipulated that the claims of these two individuals, Mr. Moore and Mr. Horton, asserted in this state court in Texas would be barred by

application of the Alabama statute of limitations if Senate Bill 220 is applied to these two cases.

Tr. 289

THE COURT: In that respect, then I would have you-all a signed, appealable order, which you will all be interested in, by November 21, 1997.

So let me just review. You're going to have enough to start sketching out proposed orders, but you will have any proposed order into the Court by November 17th.

Understand, I may sign one, I may sign the other, or I might cut and paste and put some stuff in there that I like.

I first want to deal with the issue of class certification. The Court declines to certify a class in this case.

Secondly, I want to deal with 71.052 briefly.

This Court construes 71.052 as dismissing claims filed between January 1 and May 29th, 1997, and declines the interpretation suggested by W.R. Grace.

No. 2, this Court holds that 71.051 is constitutional.

No. 3, with respect to 71.052, this Court holds that 71.052 does not violate the due process clauses of the Texas nor United States Constitution, and that I've given – there is a reasonable interpretation of the statute that notice and hearing be given before a case is dismissed.

No. 4, neither 71.052 nor 71.031, as applied to these plaintiffs – and when I say plaintiffs, there is a lengthy

list of plaintiffs, and I'm referring to those within the style of the case, since I've declined to certify it as a class.

Neither 71.052 or 71.031, as applied to these plaintiffs, violate the open courts provision of the Texas Constitution. Under the common law a nonresident had no legal right to address the courts of this state for a cause of action accruing outside the state.

And for that authority, we see Alfaro. And as I mentioned during argument, out of Alfaro comes that, as they reviewed the law, it was only a matter of comity that the cases were heard, and the that there were limited instances when Texas was the only state having jurisdiction over the defendant.

No. 5, 71.052 does not violate the equal protection claim of the Texas or United States Constitution. There is a rational basis, and the legislation is rationally related to a legitimate state interest. And it's not unconstitutional special legislation.

No. 6, 71.031 as it applies to the pre-enactment plaintiffs is unconstitutional, as it violates the privilege and immunities clause, as that is interpreted, among other cases, by Canadian Northern v. Eggen, 252 U.S. 553.

Under the applicable Alabama statute of limitations, a pre-enactment individual – and I'm sorry, I might as well reveal all of it.

I'm also holding that under 71.031, the borrowing statute for post-enactment individuals likewise violates the privilege and immunities clause.

Under the applicable Alabama statute of limitations, a plaintiff does not have a reasonable time to bring their

claim. Since they would have had to file the suit before realizing they suffered the injury, the claim would be barred, while a claim of a Texas resident which accrued at the same time as an Alabama resident would not be barred.

And the Court finds no substantial reason for this discrimination, nor any substantial relationship between the legislative scheme and any reason for this.

No. 7, the borrowing statute as it applies to pre-enactment individual plaintiffs also violates the Texas Constitution prohibition on retroactive laws. There is no reasonable time to act upon the change in the statute of limitations.

No. 8, 71.052(b) and 71.052(c) violate the privilege and immunities clause of the United States Constitution. There is no substantial reason for this discrimination.

And although the statute discriminates only on the basis of past residence ostensibly at the time of exposure, the evidence before this court overwhelmingly is that the legislative intent was to discriminate against Alabama residents, or non-residents of the state of Texas.

Discrimination against non-resident plaintiffs was the intent of the Bill. And the only reason offered by the defendants for this discrimination was the alleviation of docket congestion. I don't find any evidence before this Court, not a scintilla of evidence, that a Texas plaintiff, a Texas resident, a Texas citizen is being denied their day in court.

There is no evidence. More importantly, less restrictive means to manage this litigation are available in current practice in many district courts throughout this state, and there's no showing that the legislature considered less restrictive means other than dismissal or a cap on the damages. And the Court cites to the cases that we've talked about here today.

No. 9, Owens-Corning requests via brief that this Court declare the asbestos exception in the 1993 forum non conveniens law unconstitutional, or in the alternative that I should have the temerity to overrule Alfaro and hold that the common law of forum non conveniens is still viable. I will decline to grant either relief.

I believe that covers the Court's ruling. If there are any questions, I will do my best to provide some type of clarification if I've not made it clear in what I've done.

APPENDIX I

Tr. 31

Senator Bivins: There are – there is one guarantee in this bill, Senator, and that is if you are a Texas resident, you may bring that claim in Texas. So in your fact situation, that person would be able to bring the claim in Texas.